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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In this case, the Secretary of Labor interpreted Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 92 Stat. 2947 (1978), finding that the Petitioner's refusal to sign a pre-employment agreement, which he reasonably believed forced him to prospectively waive his statutory rights, was protected.

In light of the decision below, in which a divided panel of the United States Court of Appeals for the Third Circuit afforded the Secretary's determination no deference and upheld the employer's conditioning Petitioner's employment on his prospective waiver of statutory rights, this case presents the following questions:

1. Whether an employee may be required to prospectively waive substantive rights under the ERA as a condition of employment;

2. Whether the legality of a prospective waiver should be judged from the point of view of a reasonable employee; and

3. Whether the Secretary of Labor's determination, that an employee's refusal to sign a prospective waiver of substantive rights amounts to "protected activity" under the ERA, is entitled to *Chevron*-type deference.

RULE 14(1)(b) LIST OF PARTIES

The parties to the underlying proceeding include: (a) Petitioner, Mr. Shannon Doyle; (b) Respondent, Hydro Nuclear Services, Inc. ("Hydro"), a division of Westinghouse Corp.; and (c) the respondent below, United States Secretary of Labor ("Secretary").

The Petitioner, Mr. Doyle, was the complainant before the Department of Labor in an employment discrimination proceeding against Hydro under the nuclear whistleblower protection law, Section 210 of the ERA. After the Department of Labor Administrative Review Board ("ARB") found Hydro liable for violating the ERA and awarded Mr. Doyle over $787,000 in costs and damages, Hydro petitioned the United States Court of Appeals for the Third Circuit for review of the ARB's decision and order. Mr. Doyle intervened in Hydro's appeal, and cross-petitioned, on a damages calculation issue. The two petitions for review were consolidated before the Third Circuit.

The United States Secretary of Labor, the respondent before the Third Circuit in the Hydro appeal, is charged by Congress with oversight of the employee protection provisions of the ERA, including Section 210. As such, the Secretary had jurisdiction over Mr. Doyle's employment discrimination proceeding in the Department of Labor, where it awarded Mr. Doyle damages for Hydro's violation of Section 210. When Hydro petitioned for review of the Secretary's order, the Secretary of Labor became a respondent before the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The Petitioner in this case, Mr. Doyle, was the prevailing complainant in an ERA Section 210 employment discrimination action before the U.S. Department of Labor ("DOL") against Hydro Nuclear Services ("Hydro"). In that proceeding, the Secretary of Labor issued an order, on March 30, 1994, finding that Mr. Doyle engaged in protected activity under Section 210 when he refused to sign a pre-employment agreement which would have forced him to waive his right to later file a complaint of illegal blacklisting under the ERA. The Secretary's decision is reproduced in the Appendix ("A") hereto, at A29.[1/]

On March 27, 2002, the Third Circuit granted Hydro's petition for review, finding that the Secretary's decision regarding the legality of the prospective waiver was entitled to no deference. The Third Circuit vacated the rulings of the Secretary of Labor and dismissed all of Doyle's claims. The Third Circuit's decision is reproduced at A1.

1/ Between 1994-2000 the claim was further adjudicated before the DOL in order to determine the appropriate scope of relief. On May 17, 2000 the DOL issued its final decision in the case, awarding Mr. Doyle over $787,000 in damages and costs. Hydro did not appeal the damages ruling, and these rulings are not at issue in this Petition. Instead Hydro only challenged the liability determination issued on March 30, 1994. A3.

STATEMENT OF JURISDICTION

This is a Petition for a Writ of *Certiorari* from a March 27, 2002 decision of the United States Court of Appeals for the Third Circuit. Mr. Doyle filed a timely petition for *en banc* rehearing, and the Third Circuit denied Mr. Doyle's petition on May 30, 2002.

This Petition is filed within 90 days of the Third Circuit's denial of rehearing and rehearing *en banc*. As such, it is timely pursuant to Sup. Ct. R. 13.1, and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves Section 210 of the Energy Reorganization Act of 1974, as amended, 92 Stat. 2947 (1978). Section 210 was formerly codified at 42 U.S.C. § 5851, and is reproduced in the Appendix at A47. [2/]

[2/] Congress amended Section 210 in 1992, and Section 210 was re-designated Section 211. The 1992 amendments did not alter those portions of former Section 210 that are relevant to this case and, after the 1992 amendment, the issues presented in this case may still arise under the new Section 211. As Judge Bright noted in his dissent, below, the Third Circuit's ruling has widespread implications and may impact nearly every employment discrimination law. *See* A23 ("I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer") (emphasis supplied).

STATEMENT OF THE CASE

A. Mr. Doyle's Underlying ERA Claim.

Shannon Doyle worked in the nuclear industry as a radiation decontamination technician. Mr. Doyle "blew the whistle" on a radiological safety hazard at Alabama Power Company's Farley nuclear generating station. He also testified before the NRC on this safety concern.

After his whistleblower incident at Farley, Mr. Doyle filed a discrimination claim against Alabama Power. That case was dismissed pursuant to the ERA's 30-day statute of limitations which was in effect at the time. *See Doyle v. Alabama Power Co.*, 1989 WL 549893 (Sec'y. Sept. 29, 1989). After his employment with Alabama Power ended, Mr. Doyle found it very difficult to find work within the nuclear industry. A55. Eventually, Mr. Doyle applied to Hydro in the fall of 1988 to work as a senior decontamination technician during a planned refueling outage at the D.C. Cook nuclear generating plant in Bridgeman, Michigan. A3-A4.

Hydro agreed to hire Mr. Doyle and Doyle arrived at Bridgeman on November 7, 1988, to finalize the employment application process. As part of this Doyle was asked to execute a variety of pre-employment waivers, including two releases which permitted past employers to reveal to Hydro details of Mr. Doyle's employment history. A44 (ALJ, acknowledging other releases). These releases did not contain any prospective waivers of Mr. Doyle's ERA rights and Doyle executed all of the required paperwork.

However, because of a delay in processing Mr. Doyle's application, Doyle expressed a concern to Mr. Dan Haynes, a Hydro official, regarding potential blacklisting, and informed Haynes that he would have "no choice but to file a complaint with the DOL" if he suspected blacklisting. A53.[3/]

After Mr. Doyle raised his concerns about the potential blacklisting Hydro proffered to him a new pre-employment waiver. This waiver contained a prospective release of Mr. Doyle's substantive rights under various employment laws. As Doyle understood it, the new waiver would have released both Hydro and Alabama Power Company from any future claim of intentional discrimination under the ERA based on the impact of any negative reference provided by Alabama Power. In relevant part, the agreement stated:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results (*sic*) of furnishing or receiving such information pursuant to this authorization.

[3/] Significantly, pursuant to Department of Labor regulations implementing the ERA, an employee who is "about to" file an ERA claim related to "blacklisting" has engaged in protected activity thereunder. *See, e.g.* 29 C.F.R. § 24.2(b)(1).

A45 (the entire release is reproduced in the Appendix).

Mr. Doyle was extremely concerned that he would be blacklisted in the nuclear industry due to his prior whistleblowing activity. He refused to sign the agreement, as written, and instead crossed out the prospective waiver language before signing. A14-A15.

After objecting to the prospective release of claims, Mr. Doyle was directed to contact Hydro's manager of employee relations, Mr. Booker. The parties entered a factual stipulation regarding the conversation between Mr. Doyle and Hydro's manager:

> Later that day, Mr. Doyle spoke with Robert Booker to express his reluctance to sign the authorization form. Mr. Doyle stated that he would sign it provided the second paragraph was deleted or amended to retain his rights under the Energy Reorganization Act. Mr. Booker told Mr. Doyle that, unless he signed the release form in its entirety, HNS would cease any consideration of employing him. When speaking to Mr. Booker, Mr. Doyle mentioned a previous whistleblower incident in which he was involved.

A41-A42.

As stipulated between the parties, Mr. Doyle informed Mr. Booker of his prior whistleblowing activity and requested that Hydro modify the waiver to remove the prospective waiver. Hydro refused to modify its form.

When Mr. Doyle still refused to sign the prospective waiver, Hydro informed him that it would no longer consider him a candidate and refused to hire him. *Id.*[4/]

After refusing to hire Mr. Doyle, Hydro reported to a credit agency that Mr. Doyle had been "denied access" to a nuclear facility. It is undisputed on the administrative record that Hydro's refusal to hire and report to the credit agency caused Mr. Doyle and his family "devastating," "psychological, emotional and financial" harm. *See, e.g.* A25 (Bright, J., dissenting).

B. Procedural History.

Proceeding *pro se*, Mr. Doyle filed a complaint against Hydro on December 9, 1988, alleging that Hydro's refusal to hire him (for his refusal to sign a prospective waiver of his rights as a nuclear whistlebower) constituted a violation of the employee protection provisions of Section 210 of the ERA.

[4/] Hydro failed to demonstrate in the administrative proceeding before the Department of Labor that it ever proffered a similar prospective waiver to other employment candidates. While Hydro attempted to make this point by proffering a self-serving and untested letter to the Third Circuit, the court below denied Hydro's motion to supplement the administrative record in such a way and the letter in question was not placed on-the-record. *See Doyle v. Sec'y. of Labor*, Nos. 00-1589 and 00-2035, Order (3d Cir. March 27, 2002). Hydro had never attempted to place the letter on-the-record during the administrative proceeding.

The DOL's Wage and Hour Division and Office of Administrative Law Judges ("OALJ") initially denied Mr. Doyle's ERA claim. A38 (ALJ decision). However, the parties stipulated to certain facts during the OALJ proceeding and the case was heard by the Secretary of Labor on the basis of the stipulated record. In a March 30, 1994 Final Decision and Order, the Secretary found that Hydro had:

> violated the ERA when it refused to hire [Mr. Doyle] because he refused to sign the authorization form unless the release of liability paragraph was deleted.

A35.

The Secretary referred to several of this Court's decisions, including *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for the proposition that it was unlawful under statutes analogous to the ERA to require a prospective waiver of substantive rights. A32-A33.

As such, the Secretary found that Hydro's proffered prospective waiver was unlawful under the ERA. Specifically, the Secretary noted that, if enforced, Hydro's waiver would destroy the ERA's remedial purpose of protecting employees, would chill the speech of whistleblowers and, ultimately, would jeopardize the public health and safety. The Secretary stated:

> Requiring complainant to choose between a job and his rights under the ERA would be

> equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil*. Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems.

A34.

Moreover, the Secretary made clear that the proffered prospective waiver was completely unnecessary and had no place under the ERA. In fact, Hydro's only proffered reason for Doyle's termination was wholly inadequate because Hydro could have proceeded with the background screening, without insisting upon the waiver:

> Respondent asserts that 'the employer should be able to protect itself against any claim arising out of the innocent, but necessary, provision or receipt of information.' But Respondent has not explained why, under the ERA and its regulations it should be able to shield itself from the anti-retaliation provisions of the Act. If Respondent 'innocently,' *i.e.*, in good faith, refuses to hire an applicant based on derogatory information supplied by another employer, the other employer may be held liable for blacklisting but not the Respondent.

> However, if Respondent refused to hire an applicant because he filed a complaint with the NRC against another employer, *such a clear violation of the ERA* and the regulations would be immunized if this release were allowed to stand. Moreover, the release would immunize other employers who might, because of a retaliatory motive, provide Respondent false or misleading information about Complainant.
>
> I find that Respondent violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted.

A35 (emphasis supplied).

After the Secretary issued his March 30, 1994 determination on liability, Hydro and Doyle participated in extensive proceedings related to calculating the amount of damages owed in this case. Hydro did not appeal any of the damage determinations, and after a final ruling on damages was entered, Hydro only petitioned for a review of the March 30, 1994 liability ruling.[5/]

[5/] On May 18, 2000, Hydro petitioned the United States Court of Appeals for the Sixth Circuit for review of the DOL's final order. On May 19, 2000, Mr. Doyle petitioned the United States Court of Appeals for the Third Circuit for review of the DOL's final order solely as it related to the damages

(continued...)

On March 27, 2002, the Third Circuit, in a split 2-1 ruling, granted Hydro's petition and vacated the SOL's order finding Hydro liable under the ERA.

In its decision, the divided panel reversed the SOL's liability determination on the grounds that "Doyle did not engage in protected activity when he refused to sign" the prospective waiver proffered to him by Hydro as a condition of his employment. A17. The panel based this finding on a determination that Hydro's waiver was not legally enforceable as to blacklisting and, as such, Mr. Doyle's subjective belief as to the force and effect of the waiver was irrelevant.

Thus, despite the fact that the waiver expressly stated that it was a release from "any and all liability or claims" arising out of the furnishing or receipt of information thereunder, the panel found that the release did not relate to blacklisting. As such, the panel completely overturned the Secretary's express finding, set forth *supra*, that the release did purport to immunize Hydro from liability for blacklisting or failure to hire claims under the ERA. In so doing, the panel stated that is saw "no reason" to defer to the Secretary's construction of the pre-employment agreement. A17.

[5/](...continued)
calculation. A3. On June 5, 2000 the Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in the Third Circuit, and Hydro's petition was duly transferred thereto. Doyle's petition concerning the amount of damages was denied as moot after the Third Circuit granted Hydro's petition.

The crux of the panel's argument on this issue focused solely on what it perceived to be a contract interpretation question. To wit, the panel held that the Secretary misconstrued Hydro's proffered waiver and failed to recognize the "well-recognized principle of law" that ambiguous documents "should not be deemed illegal where capable of construction that will validate them." A16.

As a result of its conclusion that Hydro's proffered waiver did not purport to cover blacklisting, and would not have been enforceable had Mr. Doyle brought a blacklisting claim, the panel then held that:

> Doyle simply was not engaged in protected activity when he refused to sign the authorization with the release. Thus Hydro must prevail in these proceedings.

A17.

In a dissenting opinion, Judge Bright argued that the panel's logic was misplaced, as "this case is not about contract law. It is about statutory interpretation." A22. In a very concise manner, Judge Bright noted the apparent flaw in the panel's reasoning:

> On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same situation would understand the

> release language. *The legal insufficiency of the waiver is immaterial* because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

A23.

Judge Bright also recognized the broad implications of the panel's holding, and that the Third Circuit's legalization of Hydro-type waivers threatened to undermine all employment discrimination laws, not just the ERA:

> I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer. This impression would chill the employee's inclination to report safety issues to the proper regulatory authorities. Under this scenario, Congress' goal of making the nuclear industry safer by protecting potential whistleblowers is fundamentally undermined.

A23.

Further, Judge Bright lamented that the majority ruling created a "grave injustice" to Mr. Doyle and undermined nuclear safety:

> In this case, we have done a grave injustice to Mr. Doyle, a man who was blacklisted from his chosen line of work for attempting to preserve his rights under a federal statute. We have upheld an employer's ability to make its employees uncertain about the status of their nuclear whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

A25.

Mr. Doyle timely petitioned the Third Circuit for *en banc* review of the panel decision. Mr. Doyle's petition was denied on May 30, 2002, *see* A27, and Mr. Doyle now brings this Petition for Writ of *Certiorari*.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision, which Judge Bright noted in his dissent, not only dealt a severe "blow to the safety of the nuclear industry" and served a "grave injustice" upon Mr. Doyle, it also violates "all employees' rights" beyond the statute at issue in this case.

The decision below upheld the legality of a prospective waiver which Mr. Doyle believed required him to waive his substantive rights under the ERA. Sustaining the prospective waiver at issue in this case interferes with this Court's construction of employment agreements and undermines the careful balance between procedural and substantive rights set forth by the Court in a line of decisions running from *Brooklyn Savings Bank* through *Circuit City*.

This Court should now grant this Petition, because the prospective waiver legalized by the Third Circuit creates a division among the Courts of Appeals and raises exceedingly important questions this Court should review.

I. THE PROSPECTIVE WAIVER LEGALIZED BELOW CREATES A DIVISION AMONG THE CIRCUITS AND CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT.

The Third Circuit ruling conflicts with rulings of this Court and of the U.S. Courts of Appeal for the District of Columbia, Second, Seventh and Eight Circuits, which clearly hold that it is impermissible to require employees to waive substantive employment rights as a condition of employment. The panel's holding creates a division among the circuits, in the following four ways.

First, the Third Circuit is now the only circuit to uphold the legality of a prospective waiver of substantive statutory rights.

Second, the Third Circuit's decision creates a clear and unmistakable direct conflict with the United States Court of Appeals for the Eighth Circuit, with respect to whether an employer may terminate an employee over the employee's objection to a term of employment which the employee reasonably believes is illegal. It also conflicts with similar holdings of the District of Columbia, Second and Seventh Circuits.

Third, the panel's decision creates a division among the circuits as to whether, under the ERA, an employee can

even be asked to relinquish his or her rights.

Finally, the Third Circuit's decision creates a division among the circuits as to whether the Secretary of Labor's "scope of protected activity" determination under the ERA is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984) and its progeny.

A. Prospective Waiver of Substantive Rights.

This Court has repeatedly held that it is unlawful for an employer to require a prospective employee to prospectively waive substantive statutory rights as a condition of employment. *See, e.g. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (no prospective waiver of Title VII rights); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (no prospective waiver of "substantive" rights).

This long-standing prohibition against forcing an employee to waive substantive rights as a condition of employment has been a bedrock of the Court's employment decisions. *See Brooklyn Svgs. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("no one can doubt" that permitting a "waiver" of a "statutory" right would "nullify the purposes" of the law). For example, in his dissenting opinion in *Barrentine*, Chief Justice Burger reiterated the importance of the prohibition. The Chief Justice stated that "of course" a "congressionally-created right" of workers "may not be waived" through an "agreement between an individual worker and the employer." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981) (Burger,

C.J., dissenting).

As a result of this sound rule, it is now well-established that an employee may only be required to waive procedural rights, and this Court has been very careful to ensure that pre-employment waivers do not extend beyond permissible procedural waivers. *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

The Third Circuit's decision in this case threatens to blur the carefully-crafted line between substantive and procedural waivers. For, under its new precedent, any employer is now permitted to include in any pre-employment agreement a prospective waiver from "all liability or claim" arising out of either the employer's or a former employer's "furnishing or receiving" information pursuant to the agreement. *See* A45.

This new rule thus gives employers broad license to intentionally discriminate against employees, by either blacklisting or refusing to hire them.

B. Clear and Unequivocal Split Among the Circuits.

The Third Circuit in this case held that the legality of a prospective waiver should be judged on an objective, judicial basis of whether it would ultimately be enforceable, rather than on a subjective basis of whether a reasonable employee would believe the waiver to be enforceable. As such, it conflicts with decisions of other Courts of Appeals. *See, e.g. Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

To wit, the Secretary's relevant determination in this case was whether or not Mr. Doyle engaged in protected activity under the ERA when he refused to sign Hydro's proffered agreement. The Secretary expressly noted that it is immaterial whether the waiver at issue is legally enforceable, and held that whether an employee has engaged in protected activity is a matter of the employee' subjective state of mind:

> Requiring complainant to choose between a job and his rights under the ERA would be equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil.* Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. *Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems.*

A34 (emphasis supplied).

As such, it is clear that the Secretary did not rest his decision on an interpretation of Hydro's proffered agreement, but rather on the interpretation that, under the ERA, if an employee <u>believes</u> that he is being asked to prospectively waive his rights and refuses to do so, that <u>refusal</u> is protected activity – regardless of whether the proffered agreement is legally enforceable or not.[6/]

[6/] The Secretary's determination thus goes to (continued...)

The Third Circuit disagreed, and based its decision on the question of whether the prospective waiver would ultimately be found by a court to be enforceable. The panel stated that the Secretary:

> determined that by signing the release Doyle would have waived his right to file a complaint of illegal blacklisting under the ERA. Consequently he concluded that the waiver – as so construed – violated the ERA because it created an impermissible Hobson's Choice between employment and the reporting of safety hazards. As such, Doyle's refusal to sign constituted protected activity as the release could not be used lawfully to waive his right.

A15-A16.

Despite the fact that the waiver expressly stated that it was a release from "any and all liability or claims" arising out of the furnishing or receipt of information about Mr. Doyle, the panel found that the waiver did not cover

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[6/](...continued)
whether the waiver is likely to chill employees' protected activity in the future. This determination coincides with the Courts of Appeals which have noted that, when reviewing "protected activity" under the federal anti-discrimination laws, the focus should be on "the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates ." *See E.E.O.C. v. Bd. of Governors*, 957 F.2d 424, 427 (7th Cir. 1992).

blacklisting or refusal to hire claims, and that it could not do so, in light of the "well-recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them."

A16.

Thus, the Third Circuit ruled directly contrary to the Secretary, and held that an employee's reasonable belief is immaterial. According to the Third Circuit, employees who believe they are being asked to waive their rights are not protected, and the only relevant question is whether a court, at some later time, would find the proffered waiver to be enforceable.

This approach – focusing on the objective, judicial construction given to the waiver – directly and unequivocally conflicts with other Courts of Appeals' rulings, which use a "reasonable employee" standard.

For example, in *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the Eighth Circuit held that where the "immediate cause" or "motivating factor" of an employee's discharge is the fact that the employee asserted his or her statutory rights, the discharge is *per se* discriminatory.

In *Brennan*, which arose under the Fair Labor Standards Act ("FLSA"), an employee believed that her employer had engaged in unlawful conduct under the FLSA. The employee "protested" the employer's conduct, "asserted" her "statutory" rights, and refused to sign an

agreement as a result of the employer's conduct. On review, the Eight Circuit stated that the employee's

> reasonable belief was caused entirely by Maxey's conduct and her lawful assertion of rights based on that belief must be protected. To hold otherwise would defeat the Act's purpose . . . of preventing employees' attempts to secure their rights under the Act from taking on the character of a 'calculated risk.'

Brennan, 513 F.2d at 181.

Like the employee in *Brennan*, Mr. Doyle reasonably believed that Hydro's proffered waiver was unlawful under the ERA. *See* A23 (Bright, J., discussing "ordinary reader" of waiver). Like the employee in *Brennan*, Mr. Doyle protested Hydro's conduct, asserted his rights under the ERA, and refused to sign the agreement. *See* A40-A42 (parties' stipulations). Like the employer in *Brennan*, Hydro terminated Mr. Doyle's employment.

Unlike the Eighth Circuit in *Brennan*, the Third Circuit in this case held that Mr. Doyle was not protected when he lawfully asserted his rights because he reasonably believed Hydro's proffered waiver to be unlawful under the ERA. In order to protect all employees, *see* A23-A24 (Bright, J.), this Court should grant *certiorari* and reverse the Third Circuit's decision.

In addition, the Third Circuit's decision conflicts with decisions of other Courts of Appeals on the issue of

whether an employer can make an offer of employment contingent upon the employee's willingness to waive his substantive rights under the law governing his particular workplace.

For example, in *Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989), the District of Columbia Circuit held that an employment offer which required the employee to prospectively waive the substantive statutory protections of the Mine Safety and Health Act ("MSHA") was unlawful.

In *Mullins*, the S&M Coal Company was found to have unlawfully discharged a mining electrician, when it fired him for refusing to re-wire electrical equipment so the equipment would bypass safety features. After the electrician filed a complaint with the Mine Safety and Health Administration, the company offered him a position, on the condition that he agree to prospectively waive his substantive rights and "engage in unlawful and hazardous activity" as defined by the MSHA. *See* 888 F.2d at 1450.

On review of the Secretary's decision finding the prospective waiver to be unlawful, the District of Columbia Circuit squarely held that the company's offer to re-employ the electrician "under illegal and dangerous conditions transgresses the clear prohibitions" of the MSHA. 888 F.2d at 1451. Accordingly, the court found that the prospective waiver of substantive rights in that case was unlawful under the MSHA.

Mullins is very similar to this case. Like the electrician in *Mullins*, Mr. Doyle was offered employment

on the condition that he agree to forego his substantive statutory rights. The District of Columbia Circuit in *Mullins* protected the employee in that case, and upheld Congress' clearly-stated intent in enacting the employment discrimination provision in question. The Third Circuit in this case did not. As a result, employers will now be able to proffer agreements that require an employee to waive substantive rights, and employees will never find shelter in those rights until – possibly years later – a court rules upon whether the waiver is enforceable. Because this threatens not just workers in the nuclear industry, but "all employees," *see* A23-24, this Court should grant *certiorari* and reverse the Third Circuit.

Finally, the Third Circuit's decision in this case blatantly conflicts with the Second Circuit's rule, which holds that it is "protected activity" for an employee to refuse to sign an agreement he reasonably believes to be unlawful, and that it is illegal under the ERA for an employer to even proffer such an agreement.

In *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) ("*CL&P*"), the employee of a sub-contractor for a nuclear utility was terminated. The employee then complained to the NRC's resident inspector, and brought an action in state court against his employer. While the employee's case was in litigation, he entered into settlement negotiations with his former employer. The employer proposed a settlement agreement which "would have restricted" the employee's "ability to provide regulatory agencies with information" concerning either the employer or the contracting utility. *CL&P*, 85 F.3d at 91.

The employee's counsel informed the former employer that he was concerned over the restrictive language, and provided the employer with an edited version of the settlement agreement, which had removed the restrictive terms. As a result, the employer terminated settlement negotiations with the employee. 85 F.3d at 92.

The employee then filed a complaint under the ERA, alleging that, as a result of his complaints to the NRC and his wrongful termination action, the employer had proffered a settlement agreement containing unlawful provisions. *Id.* In the employee's ERA case, the Secretary of Labor found that the employer violated the ERA and that it was unlawful for the employer to even proffer to the employee an agreement which asked him to prospectively waive his rights, as "relinquishing these rights in exchange for financial considerations would be illegal and contrary to public policy." *CL&P.*, 85 F.3d at 95.

On review, the Second Circuit agreed with the Secretary. The court rejected the employer's argument that proffering the unlawful agreement could not of itself be illegal, since the employee was free to simply reject the proffer – an argument which is conceptually similar to the Third Circuit's analysis in this case. In so doing, the Second Circuit cited *Mullins*, *see supra*, and stated that:

> This characterization of adverse action not only oversimplifies the subtle, implicit, discriminatory action, but is contrary to the expansive scope of the ERA. Although the act of inducing an employee to relinquish his rights as provided by the ERA through means

> of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.

CL&P., 85 F.3d at 95.

Thus, the Second Circuit upheld the Secretary's interpretation of the ERA, and found it illegal for an employer to even proffer to an employee an agreement which would require the employee to prospectively waive his or her ERA rights.

The Third Circuit's decision in this case directly conflicts with *CL&P*, because not only did Hydro proffer what Mr. Doyle believed to be an unlawful prospective waiver, it actually refused to hire him for refusing to agree to it. For the Third Circuit to find that Hydro's actions were legal – and that Mr. Doyle had not engaged in protected activity – runs directly counter to the Second Circuit's holding in *CL&P*.

C. Deference to the Secretary's Determination.

In addition to the conflicts created by the Third Circuit upholding the prospective waiver in this case, its decision also conflicted with those of other Courts of Appeals which have deferred to the Secretary's "scope of protected activity" determinations under the ERA.

As set forth, *supra*, the Secretary in this case clearly found that Mr. Doyle engaged in protected activity by refusing to sign Hydro's prospective waiver. A34-A35.

As such, it is clear that the Secretary interpreted the ERA to find that, if an employee reasonably believes that he is being asked to prospectively waive his rights and refuses to do so, that refusal is protected activity, regardless of whether the proffered agreement is legally enforceable or not.

This determination by the Secretary was a "scope of protected activity" determination, under the ERA, which other Courts of Appeals have held is a determination that is entitled to substantial, *Chevron*-type deference. *See, e.g. Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1575 (11th Cir. 1997) (noting that Secretary's scope of protected activity determination under ERA is "accorded due deference"); *Bechtel Const. Co. v. Sec'y. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (applying *Chevron* deference analysis to Secretary's determination that internal complaints are protected); *Lockert v. Dep't. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989) ("our review of the Secretary's decision regarding scope of protected activity is deferential"); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1509-1511 (10th Cir. 1985) (affording *Chevron*-type deference to Secretary's determination that internal reporting is "protected activity").

As the panel below completely refused to grant the Secretary's "scope of protected activity" determination in this case any deference, *see* A17, the decision squarely conflicts with the decisions of other Courts of Appeals, which defer to the Secretary's determinations of this type.

For the foregoing reasons, the Third Circuit decision in this case conflicts with the decisions of other Courts of Appeals, and this Court should grant *certiorari* in order

harmonize the conflicts.

II. THE PROSPECTIVE WAIVER LEGALIZED BELOW PRESENTS EXCEEDINGLY IMPORTANT QUESTIONS.

The Third Circuit's error in this case is no minor issue, and the Court should grant *certiorari* because it also raises important questions which have far-reaching implications. If followed, the Third Circuit's ruling threatens to undermine the integrity of this Court's long line of cases concerning the permissible scope of pre-employment waivers and create an incentive for employers to include improper prospective waivers in otherwise permissible pre-employment agreements.

The Third Circuit's legalization of the prospective waiver in this case blurs the distinction between acceptable agreements, which waive procedural rights in the name of the common good, and unlawful agreements, which waive substantive rights and which this Court has consistently held to be unlawful. This blurred distinction will not only affect employment relationships in the nuclear industry, but will also affect all pre-employment agreements, including pre-employment agreements containing arbitration provisions, which this Court has consistently held are in the public interest.

The Third Circuit's prospective waiver rule will have far-reaching and detrimental results with respect to pre-employment agreements, because it misses the distinction between substantive and procedural rights. As such, it allows employers to create agreements that the courts will

ultimately find to be partially invalid. This will result in challenges to the legality of an entire pre-employment agreement, and will undermine public confidence in the pre-employment agreement process itself.

Worse, the increased litigation over waivers of this type will totally vitiate the benefits contained in straight-forward pre-employment agreements like those at issue in *Circuit City v. Adams*. As Justice Kennedy noted there, proper pre-employment agreements minimize the costs of litigation, eliminate "difficult choice-of-law questions," and reduce the complexity and uncertainty of the employer-employee relationship. *See, e.g. Circuit City*, 532 U.S. at 123. Significantly, in order to be a "proper" agreement, Justice Kennedy noted that it must not force an employee to "forego" "substantive rights." *Id.*

Moreover, the Third Circuit's rule will have a devastating impact on legitimate, protected activity by employees. Until the waiver is ultimately determined to be unenforceable by a court, untold numbers of employees who may not be aware that the waiver is unenforceable will believe that it is and will thus remain quiet because they perceive a lack of recourse should an employer blacklist them, fail to hire them, or otherwise retaliate against them.

If they are required, as a condition of employment, to sign an agreement like the one Hydro proffered to Mr. Doyle, many, if not most, employees will <u>believe</u> that they have waived the right to bring a claim against their employer or anyone else who blacklists or refuses to hire them. As Judge Bright noted in his dissent:

> The legal sufficiency of the waiver is immaterial because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

A23.

It is of absolutely no consolation that such an agreement might actually be deemed invalid at some later date by a court, when the effect of the agreement on employees who are a party to it are afraid to report health and safety concerns.

The likelihood that the Third Circuit's prospective waiver in this case will silence employees runs directly counter to the purpose of "whistleblower provisions," which even the Third Circuit itself has acknowledged are:

> intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment.

See, e.g. Passaic Valley Sewerage v. Dep't. of Labor, 992 F.2d 474, 478 (3d Cir. 1993).

Finally, the Third Circuit ignored the NRC's independent condemnation of Hydro's practice. Although the Department of Labor has jurisdiction over nuclear whistleblowing, Congress vested in the NRC independent

jurisdiction to punish retaliation against a whistleblower which impacts public health and safety. *See United States v. Construction Products*, 73 F.3d 464, 471-72 (2d Cir. 1996) (explaining NRC authority in nuclear whistleblowing matters).

The NRC reviewed the administrative record in this case, and determined that the Hydro waiver, unto itself, threatened the public health and safety, in violation of nuclear safety law, because of the chilling effect it would have on employees like Shannon Doyle. As such, the NRC issued a Notice of Violation against Hydro, condemning the Hydro waiver as "contrary" to Section 210. A57. The Third Circuit's rule completely ignores this threat, which waivers like the one here exacerbate, not only in the nuclear industry but in all industries regulated by employee-protection laws.

For these reasons, the Third Circuit's prospective waiver in this case raises important questions which this Court should resolve.

III. THE PROSPECTIVE WAIVER LEGALIZED BELOW WORKS A GRAVE INJUSTICE.

In his dissenting opinion, Judge Bright noted that Hydro's prospective waiver should be rejected as a violation of not just Mr. Doyle's rights, but of all employees' rights, and that the Third Circuit's legalization of that waiver worked a "grave injustice" upon Mr. Doyle while at the same time it "dealt a blow to the safety of the nuclear industry." A25.

The Third Circuit's approach in this case, which

ignored the potential harm to public health and safety, is particularly inappropriate because it allows employers to accomplish by facially innocuous means what it could not otherwise do under the ERA: silence employees. As the Second Circuit has stated in an analogous context:

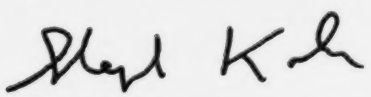
> inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.

CL&P, 85 F.3d at 95.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Doyle's Petition for Writ of *Certiorari*.

Respectfully submitted,



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United States Court of Appeals,
Third Circuit.

Shannon T. DOYLE, Petitioner,
v.
U.S. SECRETARY OF LABOR and U.S. Department of Labor Administrative Review Board, Respondents.
Hydro Nuclear Services, Inc., Petitioner,
v.
The Secretary of Labor, Administrative Review Board, and The United States Department of Labor, Respondents.

Nos. 00-1589, 00-2035.

Argued Jan. 15, 2002.
Filed March 27, 2002.

Nuclear decontamination corporation petitioned for review of order of Secretary of Labor finding that corporation violated Energy Reorganization Act (ERA) in failing to hire applicant, and of order of Administrative Review Board (ARB) awarding damages. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) burden-shifting paradigm would be applied to claim filed under ERA's anti-retaliation provision prior to effective date of amendment incorporating such paradigm; (2) applicant did not engage in protected activity when he refused to sign release-of-liability provision; and (3) corporation's proffered reason for refusing to hire applicant unless he signed release was not pretextual.
Petition granted; orders set aside.

Retaliation in violation of the Energy Reorganization Act (ERA) does not occur unwittingly and, therefore, a finding of liability requires an inquiry into the employer's state of mind to prove that the employer subjectively intended to discriminate against the employee on account of his engagement in a protected activity. Energy Reorganization Act of 1974, § 211(a), as amended, 42 U.S.C.A. § 5851(a).
*244 Stephen M. Kohn (argued), Kohn, Kohn & Colapinto, Washington, DC, for Petitioner in No. 00-1589 and Intervenor in No. 00-2035.

*245 Peter Buscemi (argued), Thomas A. Schmutz, David R. Lipson, Morgan, Lewis & Bockius, Washington, DC, Glen R. Stuart, Morgan, Lewis & Bockius, Philadelphia, PA, Hope A. Comisky, Michael H. Rosenthal , Pepper Hamilton, Philadelphia, PA, for Petitioner in No. 00-2035.

Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Lois R. Zuckerman, (argued), Office of the Solicitor, United States Department of Labor, Washington, DC, for Respondents.

BEFORE: SCIRICA, GREENBERG, and BRIGHT, [FN*] Circuit Judges.

FN* The Honorable Myron H. Bright, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

These matters come on before this court on consolidated petitions for review of a May 17, 2000 Final Decision and

Order issued by the Administrative Review Board ("ARB") acting on behalf of the United States Secretary of Labor and United States Department of Labor, and of a March 30, 1994 Final Decision and Order of the Secretary. The Secretary's decision and order determined that petitioner Hydro Nuclear Services, Inc. ("Hydro") violated Section 210 of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, when it failed to hire petitioner-intervenor Shannon T. Doyle because of his refusal to sign an authorization for release of records including a release of liability provision. The ARB's decision and order granted Doyle remedies of $218,378 in back pay, $154,695 in front pay, $45,000 in lost benefits, $80,000 in compensatory damages, $290,127.47 in attorney's fees and costs, and prejudgment and postjudgment interest on both the front and back pay.

In these proceedings Hydro contests the finding of liability while Doyle contends that the ARB should have awarded him a tax enhancement to compensate for the burden of receiving a lump sum award of back pay. For the reasons set forth below, we will grant Hydro's petition, set aside the Secretary's finding of liability, and vacate all awards of damages, remedies, fees and costs. Therefore, we will dismiss Doyle's petition as moot.

I. *BACKGROUND*

A. *Factual History*

The factual synopsis we detail below is not controverted. Hydro,[FN1] based in Moorestown, New Jersey, provided temporary workers to assist in the decontamination and maintenance of nuclear power plants. Hydro had a contract with the D.C. Cook nuclear power plant in Bridgeman, Michigan, to supply the plant with temporary and year-round

decontamination technicians.

FN1. In 1989, Hydro combined with two other subsidiaries of Westinghouse Electric Corporation under the name Westinghouse Radiological Services. Nevertheless, though technically Hydro no longer exists as a separate entity, we employ the name "Hydro" for the sake of simplicity.

In the fall of 1988, Hydro recruited Doyle to work as a temporary senior decontamination technician during a planned refueling outage at the plant. The pay rate for this job was to be modest, $6.50 per hour with an enhancement for overtime and a $48.00 per diem allowance. As part of the routine screening process, Hydro required Doyle to take a series of psychological and drug tests and to complete a routine employment application that included Hydro's standard "Authorization ***246** for Release of Information and Records." In this regard, Hydro treated Doyle the same as all other job applicants, and Doyle does not claim otherwise. The authorization stated as follows:

> AUTHORIZATION FOR RELEASE OF INFORMATION AND RECORDS
>
> In accordance with the Privacy Act (5U.S.C. 552a), I, the undersigned expressly authorize any person, association, firm, company, criminal justice agency, Credit Extending Organizations, Schools, Doctors, or Hospitals, Department or agency of a City, County, or State Government, or of the Federal Government to release and furnish to Hydro Nuclear Services and its authorized representatives _____ any and all information and records pertaining to me including, but not limited to, originals or copies of any documents, records, reports, transcripts, abstracts, military records, criminal records, or any other

information.

Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation, my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations.

A photo copy of this authorization shall be deemed an original and shall be accepted as such by any person or organization.

JA at 181.

Doyle refused to sign the authorization presented, asserting to Robert Booker, Hydro's Manager of Employee Relations, that the second quoted paragraph waived his right to file a charge under the ERA. Doyle's concern largely was attributable to his belief that his former employer, Alabama Power Company, against whom he had filed a "whistleblowing" claim, implicitly was included in the release. Doyle advised Booker of this claim, thus giving Hydro its first notice of it. Doyle opted to cross out the paragraph in question and sign the redacted version of the authorization.

Booker, however, informed Doyle that unless he signed the original version of the authorization, Hydro would be unable to tender him an offer of employment. Notwithstanding the caveat, Doyle refused to sign the full authorization. Hydro, in turn, chose not to hire Doyle, though it did compensate him

for travel expenses and per diem rates as agreed.

B. *Procedural History*

On December 9, 1988, Doyle filed a *pro se* complaint with the Wage and Hour Division of the United States Department of Labor, alleging that Hydro violated the employee protection provisions of the ERA by refusing to hire him unless he signed the release. Hydro filed a response on January 26, 1989.

After an unsuccessful conciliation attempt and investigation, the Wage and Hour Division rejected the claim, concluding that Hydro did not violate the ERA by ceasing to consider Doyle for potential employment once he refused to sign the full authorization because "[a]ll evidence indicates that Hydro Nuclear Services, Inc. terminated [Doyle's] employment solely because of [his] refusal to sign the firm's standard Privacy Act waiver form and not because of [his] prior admitted whistleblower ***247** activities" or engagement in other "protected activity under the Energy Reorganization Act." JA at 186.

Notified of his right to appeal and obtain a hearing on the merits, Doyle formally requested review by an administrative law judge. Hydro and Doyle submitted a stipulated record of fact and motions for summary decision pursuant to 29 C.F.R. §§ 18.40 and 18.41.

On July 11, 1989, the administrative law judge issued his Recommended Decision and Order Granting Respondent's Motion for Summary Judgment indicating as follows:

> [Hydro] had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [sic] record. Since [Doyle] refused to accept this requirement I find that [Hydro] had a legal right to

> refuse to employ [Doyle]. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. [Hydro] in requiring all employees including [Doyle] to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.
> JA at 10-11.

The Secretary conducted a *de novo* review of the recommendation of the administrative law judge. Finally, on March 30, 1994, the Secretary issued a letter Final Decision and Order, rejecting the analysis of the administrative law judge and concluding that Hydro "violated the ERA when it refused to hire [Doyle] because he refused to sign the authorization form unless the release of liability paragraph was deleted." JA at 22. The Secretary ordered Hydro to reinstate Doyle with back pay, including interest.

In reaching his result the Secretary indicated that "[e]ven lawyers can disagree over the scope and effect of the language in question." He indicated, however, that:

> Giving the authorization form its most narrow reading, it would release [Hydro] and any other employer from whom [Hydro] obtained information about [Doyle] from any claim that the information had been provided or used to deny [Doyle] employment because of protected activities under the ERA. In other words, by signing the form, [Doyle] would have waived his right to file a complaint of illegal blacklisting under the ERA.
> JA at 16-17 (footnote omitted).

The Secretary subsequently stated:

> There can be little doubt that, if [Doyle] had signed the authorization form, but [Hydro] refused to hire

him based on information from a previous employer about [Doyle's] protected activities, and [Doyle] filed a complaint under the ERA of discriminatory refusal to hire, waiver of rights under the ERA could not be raised by [Hydro] as a defense. Otherwise, any covered employer could nullify the Act and Congressional intent to protect public health and safety by prohibiting retaliation against those who report potential safety hazards in the construction and operation of nuclear power plants.

JA at 19.

Hydro petitioned this court for review of the Secretary's decision and order on May 26, 1994. Thereafter, on August 24, 1994, we granted a joint motion of the Secretary and Hydro to remand the matter for further administrative proceedings to determine Doyle's remedy. On September 7, 1994, the Secretary, in turn, remanded the case to an administrative law judge.

***248** After permitting additional discovery on the issue of damages, the administrative law judge conducted a hearing on December 14, 1994. The judge issued a Recommended Decision and Order on Damages on November 7, 1995, awarding Doyle back pay, front pay, compensatory damages, interest, attorney's fees, costs, and other equitable relief, including corrections to his personnel records. *See* JA at 44. With limited changes, the ARB, acting on behalf of the Secretary pursuant to 61 Fed. Reg. 19978, adopted those recommendations on September 6, 1996. *See* JA at 55-65. [FN2] Subsequently, Doyle and Hydro respectively filed petitions for review with this court and with the United States Court of Appeals for the Sixth Circuit, which thereafter were consolidated and dismissed as premature. *See* JA at 708-713.

FN2. The Board rejected the recommendations concerning front pay and encouraged the parties to reach an agreement on the average hourly rate for non-local decontamination workers in the nuclear industry during the relevant period. *See* JA at 62.

On November 26, 1997, the ARB remanded the case to an administrative law judge for further proceedings to resolve the open issues regarding the proper amount of damages to which Doyle was entitled. *See* JA at 66-71. The parties entered into a series of stipulations, following which an administrative law judge issued his Final Recommended Decision and Order on Damages on February 12, 1999, *see* JA at 100-11, and his Final Recommended Decision and Order Awarding Attorney Fees on November 15, 1999. *See* JA 114-29. On May 17, 2000, the ARB issued its Final Decision and Order in this matter. *See* JA at 130-56.

On May 18, 2000, Hydro petitioned for review of the Final Decision and Orders of March 30, 1994, and May 17, 2000, to the United States Court of Appeals for the Sixth Circuit. The following day, Doyle petitioned this court for review of the Final Decision and Order of May 17, 2000 insofar as it provided for damages. [FN3] On June 5, 2000, the Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in this court. The Court of Appeals for the Sixth Circuit then transferred the Hydro petition to this court on July 6, 2000, and we consolidated the proceedings on July 14, 2000. [FN4]

FN3. Hydro petitioned the Court of Appeals for the Sixth Circuit because the events at issue here took place within that circuit. Doyle petitioned this court as Hydro's office was within this circuit.

FN4. Doyle has filed an action in the United States District Court for the Western District of Pennsylvania to enforce the monetary award of the ARB but the district court has stayed that case pending

disposition of the petitions before this court.

II. *JURISDICTION*

We have jurisdiction to review a final order of the Secretary of Labor pursuant to 42 U.S.C. § 5851(c). [FN5] The Secretary of Labor had subject matter jurisdiction over this action pursuant to 42 U.S.C. § 5851(b).

FN5. Section 5851(c) states, in pertinent part, that "[a]ny person adversely affected or aggrieved by an order issued [by the Secretary of Labor] ... may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred."

III. *DISCUSSION*

A. *Standard of Review*

A reviewing court may overturn a decision of the Secretary only if it is "arbitrary, ***249** capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); [FN6] *see Southwestern Pa. Growth Alliance v. Browner,* 121 F.3d 106, 111 (3d Cir.1997). However, while we pay deference to the Secretary in construing the statutes he is charged with administering, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and will set aside the Secretary's factual determinations only if they are unsupported by substantial evidence, 5 U.S.C. § 706(2)(E), we exercise plenary review in deciding questions of law. *See Dill v. INS,* 773 F.2d 25, 28 (3d Cir.1985); *see also Williams v. Metzler,* 132 F.3d 937, 946 (3d Cir.1997) ("we owe no deference to an erroneous conclusion of law").

FN6. 42 U.S.C. § 5851(c)(1) incorporates by reference section 706 of the Administrative Procedure Act.

B. *Hydro's Liability Under the ERA*

Section 210 [FN7] of the ERA prohibits an employer from discharging or otherwise "discriminat[ing] against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in any of the activities protected under the Act, including reporting an alleged nuclear safety violation or refusing to engage in any practice made unlawful by the ERA. 42 U.S.C. § 5851(a). [FN8]

FN7. When Doyle brought his complaint, the whistleblower protections at issue were included in section 210 of the ERA. In 1992, Congress redesignated the relevant section as 211. *See Timmons v. Mattingly Testing Servs.*, No. 95-ERA-40, 1996 DOL Ad. Rev. Bd. LEXIS 30, at *1 n. 2 (June 21, 1996).

FN8. In 1992, Congress extended ERA protection to employees lodging internal complaints. Previously, a number of courts had distinguished between whistleblowers who provide information to government entities from those who complain merely to the employer. *Compare Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1034 (5th Cir.1984) (absence of express language covering employees filing internal complaints suggests that Congress intended to deny protection), *with Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512-13 (10th Cir.1985) (rejecting a "narrow, hyper-technical reading of § 5851 ... to effect the statute's aim of protection" by extending coverage to cases involving the filing of internal complaints). The Act as amended now protects an employee who "notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954," 42 U.S.C. § 5851(a)(1)(A), and an employee who "refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer," 42 U.S.C. § 5851(a)(1)(B).

The Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210 to incorporate a burden- shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a "contributing factor" in the unfavorable personnel decision. [FN9] However, these ***250** amendments do not apply here because Doyle filed his claim well before October 24, 1992. *See* Pub.L. No. 102-486, 106 Stat. 2776, 3125.

FN9. The amendment, aptly titled "Avoidance of Frivolous Complaints," also adopted a host of additional gatekeeping functions (for example, the Secretary cannot even initiate an investigation until the complainant establishes a prima facie case). *See* Pub.L. 102-486, 106 Stat. 2776, 3123(d). 42 U.S.C. § 5851(b)(3) now provides:

> (A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint. (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence

> that it would have taken the same unfavorable personnel action in the absence of such behavior.

We find no guidance in the governing provisions of the ERA in force before the 1992 amendments allocating the procedural burdens in a section 210 whistleblower discrimination claim. However, prior to 1992, the Secretary consistently utilized the burden shifting taxonomy for ERA retaliation actions set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Dysert v. Westinghouse Elec. Corp.,* No. 86-ERA-39, 1991 DOL S. Labor LEXIS 72 at *4-5 (Oct. 30, 1991); *Riden v. Tennessee Valley Auth.,* No. 89-ERA-49, 1990 DOL S. Labor LEXIS 80 at * 10-12 (Feb. 9, 1990); *Long v. Roadway Express, Inc.,* No. 88-STA-31, 1989 DOL S. Labor LEXIS 53 at *10 (Sept. 15, 1989).

Moreover, even though the Supreme Court never ruled on the point, a number of other courts of appeals followed course by applying the burdens of proof and production originally created to address actions arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to whistleblower retaliation claims brought under the ERA prior to the 1992 amendments. *See, e.g., Kahn v. United States Sec'y of Labor,* 64 F.3d 271, 277-78 (7th Cir.1995); *Bechtel Constr. Co. v. United States Sec'y of Labor,* 50 F.3d 926, 933-34 (11th Cir.1995); *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir.1989); *Consolidated Edison Co. of New York, Inc. v. Donovan,* 673 F.2d 61, 62 (2d Cir.1982); *cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor,* 992 F.2d 474, 480-81 (3d Cir.1993) (adapting McDonnell Douglas prima facie standard to retaliatory discharge claim under the Clean Water Act, 33 U.S.C. § 1367(a)); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (same, under the Surface Transportation Assistance Act, 49 U.S.C. § 2305(a)).

We find no reason to deviate from the procedure followed by the Secretary and the other courts of appeals and thus we will not distinguish ERA actions from claims arising under analogous anti-retaliation statutes. Accordingly, we adopt the *McDonnell Douglas* burden shifting guidelines in our analysis of this case. [FN10] Under this burden shifting regime the employee in the first instance must establish a prima facie case. If he does then the burden shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse action. If the employer does so the employee is required to prove that the employer's proffered reason for its action is a mere pretext for unlawful retaliatory conduct. *See Kahn,* 64 F.3d at 277-78. For Doyle to establish a prima facie case he must demonstrate: (1) his engagement in protected activity; (2) Hydro's awareness of his engagement in protected activity; (3) an adverse employment action; and (4) a sufficient inference of retaliatory motive. *See* ***251** *Macktal v. United States Dep't of Labor,* 171 F.3d 323, 327 (5th Cir.1999). [FN11]

FN10. We note further that the parties do not dispute the applicability of the standard.

FN11. Regardless, even were we to reject the applicability of *McDonnell Douglas* to an action for retaliation under the ERA, the statute compels that we reach the pivotal issue of whether Hydro discriminated against Doyle because he availed himself of ERA-protected rights. *See Blum v. Witco Chem. Corp.,* 829 F.2d 367, 372 n. 2 (3d Cir.1987) ("Once a case has been fully litigated, however, it is unnecessary for the appellate court to decide whether a prima facie case had, in fact, been established.") (internal punctuation omitted).

Thus, in spite of its considerable procedural twists and turns, [FN12] we are satisfied that this case boils down quite simply to the following issue: Did Doyle, in the first instance,

make out a prima facie case of unlawful retaliation on the part of Hydro? We answer this question in the negative. [FN13]

FN12. While we understand that the scope of any litigation may far exceed its reasonably contemplated time and costs, it is simply inexplicable that this fairly straightforward case has toiled in the federal administrative and judicial dockets for more than 13 years. Even taking into account the changes in governmental administration, we especially are confounded by the fact that the record reflects no activity in the case from July 11, 1989, until March 30, 1994, when the Secretary made his initial Final Decision and Order. In this regard we point out that this decision and order consisted of a nine-page double spaced letter of no great complexity.

FN13. Hydro does not contend that the Secretary erred in regarding Doyle as covered by section 210 even though he was merely an applicant for employment.

First, we conclude that Doyle did not engage in protected activity when he refused to sign the employment application with the release. The Secretary, disagreeing with the Wage and Hour Division of the Department of Labor and the administrative law judge, determined that by signing the release Doyle "would have waived his right to file a complaint of illegal blacklisting under the ERA." Consequently, he concluded that the waiver-as so construed-violated the ERA because it created for employees an impermissible Hobson's Choice between employment and the reporting of safety hazards. As such, Doyle's refusal to sign constituted protected activity as the release could not be used lawfully to waive his right.

Yet the release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[ ] of furnishing or receiving such information pursuant to this authorization."

This limited purpose was consistent with the authorization's provision waiving rights to privacy in its first paragraph. Furthermore, the third paragraph of the authorization confirms the limited purpose of the release by authorizing Hydro to use the information for the enumerated purposes ("evaluation" and "eligibility for clearance") without suggesting that an employment applicant released Hydro from liability under the ERA if it made an unlawful employment determination. The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Moreover, even if the release, as the Secretary thought, could be construed to include a waiver of Doyle's right to file a complaint for illegal blacklisting, the Secretary should not have so construed it in light of a well- recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them. *See Walsh v. Schlecht,* 429 U.S. 401, 407-08, 97 S.Ct. 679, 685, 50 L.Ed.2d 641 (1977). After all, the Secretary himself ***252** made the point that such a waiver would be unenforceable. Thus, the Secretary should not have construed the authorization to include an illegal release.

In sum, the Secretary went through the following process. He took a release that he regarded as ambiguous and construed it to apply to situations that by its terms it did not include. He then held that the release was unlawful and found liability by reason of Hydro's action in refusing to hire Doyle because he would not sign the authorization with the release. But we will not similarly construe the release to have the expansive effect the Secretary attributes to it and, accordingly, we hold that Doyle simply was not engaging in a protected activity when he

refused to sign the authorization with the release. [FN14] Thus, Hydro must prevail in these proceedings.

FN14. We see no reason to defer to the Secretary on this issue of law involving the construction of a proposed contract rather than construction of a statute. *See Williams v. Metzler,* 132 F.3d at 946. In reaching our result we are treating this case as involving contractual construction rather than interpretation as the parties' stipulation of facts did not address the meaning of the release and the parties did not address its meaning with other evidence. Thus, this is not a case in which the Secretary reached a conclusion after a plenary hearing addressing the parties' intent when Hydro tendered the authorization. Moreover, we do not find the release to be ambiguous. *See Beck v. Reliance Steel Prods.,* 860 F.2d 576, 581 (3d Cir.1988). We also note that the Secretary must have thought that he was construing the release as he made it clear that he was dealing with its "scope and effect." Regardless, even if we treated the case as involving contractual interpretation rather than construction our result would be the same as the evidence, *i.e.,* largely the authorization itself, could not support the Secretary's result.

There is a second, independent reason why we are constrained to grant Hydro's petition and set aside the decision and order of the ARB. Accepting *arguendo* that Doyle established a prima facie case, he has not offered substantial evidence to support a conclusion that Hydro's proffered legitimate reasons for refusing to hire him without his signing the authorization with the release-namely, to ensure power plant integrity and compliance with the governing regulatory framework [FN15] by hiring only carefully screened temporary employees-were pretextual, as required to impose liability. This point is critical for the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000), indicated that once the employer provides a legitimate, non-discriminatory reason for the personnel decision, the burden shifts to the complainant

to show by a preponderance of the evidence that the employer's benign explanation was contrived in order to obscure the genuine discriminatory motive percolating beneath.

> FN15. *See, e.g.,* 53 Fed.Reg. 7534 (The Nuclear Regulatory Commission proposing background investigation, psychological evaluation, and behavioral observation of individuals who require unescorted access to vital areas of nuclear facilities); *see also* 10 C.F.R. § 73.56 (1991) (unescorted access authorization:
>
> > must include ... [a] background investigation designed to identify past actions which are indicative of an individual's future reliability within a protected or vital area of a nuclear power reactor. As a minimum, the background investigation must verify an individual's true identity, and develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and verify an individual's character and reputation).

Here, Doyle simply did not meet that burden. [FN16] Indeed, the record makes ***253** clear that Hydro furnished the authorization to all applicants for temporary positions. More significantly, the record does not illustrate that Hydro previously made exceptions in its hiring practices for applicants, if there were any, similarly situated to Doyle who insisted on signing a modified version of the authorization or on not signing the authorization at all. [FN17] *See EEOC v. Metal Serv. Co.,* 892 F.2d 341, 347 (3d Cir.1990) (a disparate treatment violation is made out only when an individual is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion). Without any circumstantial evidence to suggest that Hydro treated him less favorably because of his exercise of rights purportedly protected under the ERA, Doyle's inventive characterization of the parties' stipulation of facts standing alone is unavailing. [FN18]

FN16. In fact, the Secretary never addressed in his Final Decision and Order the issue of Hydro's discriminatory intent and instead expressly limited the inquiry simply to a determination of whether the activities in which Doyle participated and for which Doyle was not hired were protected statutorily. *See* JA at 21 n. 5 ("The issue here, however, is not whether use of the form was a pretext for discrimination or some other impermissible reason. Respondent's reason for not hiring Complainant is clear. The *only* issue is whether that reason is itself a violation of the ERA.") (emphasis added). However, retaliation as a matter of law (and logic) does not occur unwittingly and, therefore, a finding of liability requires "an inquiry into the defendant's state of mind" to prove that "the defendant subjectively intended to discriminate against the plaintiff" on account of his engagement in a protected activity. *EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 297 (7th Cir.1991) (citing *Intl. Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977)).

FN17. Likewise, the record does not explicate that Hydro accommodated applicants comparable in all respects to Doyle save for previous whistleblowing activity. Of course, the gravamen of Doyle's complaint was not that Hydro retaliated because he disclosed prior whistleblowing activities, but because he refused to sign the authorization as written. *See* JA at 179-80 (advancing, in his initial complaint to the Department of Labor, arguments concerning only the legitimacy of the waiver); *see also* JA at 202-204 (same, in his Prehearing Statement of Position); JA at 206- 07 (same, in his Motion for Summary Decision).

FN18. Doyle purports to extrapolate from the stipulated facts, JA at 194-96, that Booker (and by extension, Hydro) must have intended to force him to waive his rights under section 210 as a condition of employment because Booker refused to alter the form even though Doyle was perfectly willing to permit complete access to his previous employment records. However, as Hydro correctly notes, Doyle's induction depends on an assumption not borne out by the record that Booker understood that the standard version of the form functioned to release Hydro from future claims under the ERA.

Doyle suggests that Hydro's discriminatory intent nevertheless may be inferred from the authorization itself. We are not persuaded because the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually. Likewise, the authorization does not differentiate between employers in high-risk industries like nuclear power that trigger our greatest concerns about blacklisting and employers in otherwise innocuous, generic industries from whom information also could be sought in the application process. Moreover, as we previously have discussed, the terms of the authorization with the release served only to facilitate-without incurring liability-Hydro's assimilation of necessary and highly sensitive employee background information and not to insulate Hydro from potential ERA claims or to chill manque nuclear whistleblowers. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 727 (3d Cir.1995) ("The touchstone of explicit facial discrimination is that the discrimination is apparent from the terms of the policy itself"). [FN19]

FN19. *Compare Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192, 197, 111 S.Ct. 1196, 1200, 1202, 113 L.Ed.2d 158 (1991) (policy that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights" was facially discriminatory because it "excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender"); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (employer's policy requiring female employees to make larger contribution to pension fund than male employees is discriminatory on its face); *Connecticut Light & Power Co. v. Sec'y of United States Dep't of Labor*, 85 F.3d 89, 95-96 (2d Cir.1996) (proposed settlement agreement violated the ERA because it contained explicit gag provisions aimed at having the employee relinquish his statutory rights); *EEOC v. Board of*

Governors of State Colls. & Univs., 957 F.2d 424, 431 (7th Cir.1992) (holding that a collective bargaining agreement violated the anti-retaliation provision of the Age Discrimination in Employment Act because, on its face, it unambiguously denied an employee his contractual right to file an in-house grievance once he elected to file an age discrimination charge).

***254** It is undeniable that Hydro initially required Doyle to sign the authorization before it was aware of his prior claim against Alabama Power and that in doing so it treated him the same as other applicants for employment. Furthermore, in view of the highly regulated nature and risks in the nuclear power industry we cannot hold that Hydro did not have a legitimate reason for requiring him to sign the release. Indeed, despite Doyle's protestations to the contrary, the other forms he signed in connection with the employment application are not comparable to the authorization because they concerned only an applicant's possible prior criminal record, not his full employment history. *See* JA at 261, 269. Thus, Doyle's case must fail. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

IV. *CONCLUSION*

For the foregoing reasons, we will grant the petition for review filed by Hydro in No. 00-2035, and set aside the March 30, 1994 Final Decision and Order of the Secretary of Labor as to liability and the May 17, 2000 Final Decision and Order of the ARB as to damages and remedies. We will dismiss the petition for review filed by Doyle in No. 00-1589 as moot because we are setting aside the finding of liability outright

without further proceedings. This opinion is intended to bring this case to a conclusion.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent from the majority's opinion. This case is not about contract law. It is about statutory interpretation and, as the Secretary of Labor recognized, Congress' goal of protecting our nation from a nuclear accident through the promotion of safety in the nuclear power industry. Quite simply, workers who report safety violations should be protected and not suffer retaliation for their good deeds.

In the instant case, the Secretary looked to the text and underlying purposes of the employee protection provisions of the ERA and construed the statute to protect Shannon T. Doyle's ERA whistleblower rights. Because of the compelling public interest in keeping channels of information open, the Secretary decided that employees must not be compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment.

***255** On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. [FN1] This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same situation would understand the release language. [FN2] The legal insufficiency of the waiver is immaterial because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

FN1. The waiver of liability includes sweeping terms, such as "furnishing or receiving *any* information pertaining to me from *any*

and all liability or claim ..." (emphasis added).

FN2. I quote from the Secretary's decision:

> I note that Complainant is a layman who was not represented by counsel when the dispute over the authorization form took place. Even lawyers can disagree over the scope and effect of the language in question. It is not surprising that Complainant refused to sign a form which could easily be interpreted as a waiver of his rights under the ERA.
> JA at 16, n. 1.

I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer. This impression would chill the employee's inclination to report safety issues to the proper regulatory authorities. Under this scenario, Congress' goal of making the nuclear industry safer by protecting potential whistleblowers is fundamentally undermined. *See Passaic Valley Sewerage v. United States Dept. of Labor,* 992 F.2d 474, 478 (3d Cir.1993) ("Such 'whistle-blower' provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment....").

A broad interpretation of the scope of ERA protection comports with the ERA's remedial purpose and the legislative history indicating that a narrow interpretation of the employee protection provisions would frustrate the intent of Congress. *See Connecticut Light & Power Co. v. Secretary of Labor,* 85 F.3d 89, 94 (2d Cir.1996) (upholding Secretary's broad interpretation of the term "employee" to cover an employee recently terminated). *See also Bechtel Constr. Co. v. Secretary of Labor,* 50 F.3d 926, 932 (11th Cir.1995) ("[I]t is appropriate to give a broad construction to remedial statutes such as

nondiscrimination provisions in federal labor laws."); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir.1985) (affirming the Secretary's broad interpretation of protected activity).

Additionally, Hydro's refusal to alter the release upon learning of Mr. Doyle's concerns supports the inference that Hydro used Doyle's refusal to sign as a convenient way to avoid hiring an individual who is zealous about nuclear safety. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Finally, Hydro did not need the waiver of liability to get the information it required about Mr. Doyle. The screening procedures of the American National Standard on Security for Nuclear Power Plants (ANSI) indicate that all the background information necessary to meet the ANSI standard can be obtained through a simple ***256** release; there is nothing in the standard or screening requirements that requires a waiver of liability. The Secretary makes this point forcefully: "Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability." JA at 21.

I would sustain the Secretary's decision. In this case, we have done a grave injustice to Mr. Doyle, a man who was blacklisted from his chosen line of work for attempting to preserve his rights under a federal statute. [FN3] We have upheld an employer's ability to make its employees uncertain about the status of their nuclear whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

FN3. Despite diligently seeking employment outside the nuclear industry, Mr. Doyle was only able to obtain three non-nuclear related jobs between November 1988 and December 1994 (the date of the hearing on damages) from which he earned a total of about $3000. Hydro's publication of its decision to deny Mr. Doyle access at a nuclear power plant had a devastating psychological, emotional, and financial impact on Mr. Doyle and his family.

285 F.3d 243, 18 IER Cases 838

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1589 & 00-2035

SHANNON T. DOYLE,
Petitioner at No. 00-1589

v.

U.S. SECRETARY OF LABOR and
U.S. DEPARTMENT OF LABOR ADMINISTRATIVE
REVIEW BOARD,

Respondents

HYDRO NUCLEAR SERVICES, INC.,
Petitioner at No. 00-2035

v.

THE SECRETARY OF LABOR,
ADMINISTRATIVE REVIEW BOARD,
and THE UNITED STATES DEPARTMENT OF LABOR,

Respondents

(Cases No. 89-ERA-22 (ALJ),
Nos. 99-041, 99-042, 00-012 (ARB))

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY,
AMRO, FUENTES, GREENBERG*, and BRIGHT**,
Circuit Judges

The petition for rehearing filed by petitioner/intervenor, Shannon T. Doyle, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

* As to the panel rehearing only.
** The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Judicial Circuit, who sat by designation, as to panel rehearing only.

BY THE COURT,

_____

Circuit Judge

Dated: May 30, 2002

Doyle v. Hydro Nuclear Servs., **89-ERA-22** (Sec'y Mar. 30, 1994) (served on Apr. 1, 1994)

DATE: March 30, 1994
CASE NO. **89-ERA-22**

IN THE MATTER OF

SHANNON T. DOYLE
COMPLAINANT,

v.

HYDRO NUCLEAR SERVICES,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R.D. and O.) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), recommending that the complaint be dismissed. He held that Respondent refused to hire Complainant for a legitimate reason, not for protected activities under the ERA.

Complainant applied for a position with Respondent in October 1988 and went through various employment screening

procedures in November 1988. Among other things, Respondent required Complainant to complete an Authorization for Release of Information and Records (authorization form), authorizing Complainant's prior employers and other organizations to release his employment and other records to Respondent. The authorization form included the following paragraph which Complainant crossed out before signing the form:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any
>
> [PAGE 2]
> organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Complainant objected to this paragraph of the authorization form because he believed it constituted a waiver of his rights under the ERA. Complainant told Robert Booker, Respondent's Manager of Employee Relations, about Complainant's "previous whistleblower status and the difficulties [he] had experienced in obtaining further nuclear industry [sic] employment." December 9, 1988 complaint to Wage-Hour Division, page 6. Complainant refused to sign another copy of the authorization form unless it was amended and Respondent refused to hire him.

The ALJ held that Complainant misconstrued the authorization form because he "incorrectly believes that [the] release would jeopardize any 'whistleblower' remedies he may be pursuing against other entities." R.D. and O. at 4. The ALJ concluded that "Respondent had a right to require all

prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [sic] record. Since Complainant refused to accept this requirement . . . Respondent had a legal right to refuse to employ Complainant." I disagree with the ALJ's interpretation of the authorization form, and the applicability of the ERA to this situation.

The ERA provides that:

> No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under [the ERA] . . . (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of [the ERA].

The authorization form releases Respondent and "any organization . . . furnishing . . . information [about Complainant] from *any and all liability* . . . as [a] result[] of furnishing or receiving such information . . . ." (Emphasis added.) Giving the authorization form its most narrow reading, [1]

[PAGE 3]

it would release Respondent and any other employer from whom Respondent obtained information about Complainant from any claim that the information had been provided or used to deny Complainant employment because of protected activities under the ERA. In other words, by signing the form,

Complainant would have waived his right to file a complaint of illegal blacklisting under the ERA. [2]

No case have been found, and the parties have not cited any, directly on point. Cases from other areas dealing with analogous situations indicate, however, that waivers such as this are highly disfavored. An analogous situation arose under the Fair Labor Standards Act, 29 U.S.C. §§ 201-217 (1988). In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), an employee accepted a check from his employer for overtime pay which the employer had failed to pay him two years before, and signed a release of all his rights under the FLSA. The employee later sued for liquidated damages under § 216(b). 29 U.S.C. § 216(b). The Court held that such a written waiver, in the absence of a bona fide dispute between the parties as to liability, does not bar a claim for liquidated damages. The Court said "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." 324 U.S. at 697. Whether the statutory right may be waived under any particular statute depends on the intent of Congress. Id. The Court looked to the legislative policy behind the liquidated damages provision because the FLSA and the legislative history were silent on this point. Id. at 706. The Court found the purpose of the FLSA was "to protect certain groups . . . from sub-standard wages and excessive hours which endangered the national health and well being and the free flow of goods in interstate commerce." Id. Waiver of statutory minimum wages and overtime pay would nullify the act, and the Court found that waiver of liquidated damages would have the same effect. Id. at 707.

Even where individuals considered themselves "volunteers" who would not accept compensation from the

business enterprises of a religious foundation, the Court has held that they are nevertheless employees if they meet the "economic realities" test. Otherwise, employers could coerce employees through superior bargaining power to testify that they are volunteers, or to waive their rights under the FLSA. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985).

Waiver of a right to sue on an existing claim under Title [PAGE 4] VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act is enforceable, if there is proof that the waiver and the circumstances under which it was signed meet certain standards. *See. e.a., Torrez v. Public Serv. Co.*, 908 F.2d 687, 689 (10th C ir. 1990). [3] However, "[t]here can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

There can be little doubt that, if Complainant had signed the authorization form, but Respondent refused to hire him based on information from a previous employer about Complainant's protected activities, and Complainant filed a complaint under the ERA of discriminatory refusal to hire, waiver of rights under the ERA could not be raised by Respondent as a defense. Otherwise, any covered employer could nullify the Act and Congressional intent to protect public health and safety by prohibiting retaliation against those who report potential safety hazards in the construction and operation of nuclear power plants. *Mackowiak v. University Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (the ERA has "the broad remedial purpose of protecting workers from retaliation based on their concerns for safety and quality"); *Hill v. TVA*, Case Nos. 87-ERA-23, 24, Sec. Decision May 24, 1989, slip op. at 4-5 ([i]n the nuclear power industry, given the magnitude of the potential hazards to

employee and public safety and health, there is an especially compelling need to keep open the channels of communication regarding potential safety and quality violations. "If employees are coerced and intimidated into remaining silent when they should speak out, the results can be catastrophic." *Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, J., concurring)).

Requiring Complainant to choose between a job and his rights under the ERA would be equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil.* Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems. [4]

Respondent argues that it was following the American National Standard on Security for Nuclear Power Plants, ANSI/ANS - 3.3 - 1982, which provides for a comprehensive screening program for employees who are granted unescorted access to a nuclear power plant. One part of the screening program is a background review, which requires the individual to sign a release authorizing Respondent to obtain information from previous employers, educational records information, and a criminal records check. This information is necessary, Respondent states, [PAGE 5] "to satisfy the plant operator that the individual is not a threat to the plant or the public health and safety." Respondent's Brief in Support of Recommended Decision and Order at 15.

Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability. Respondent asserts that "[t]he employer should be able to protect itself

against any claim arising out of the innocent, but necessary, provision or receipt of information." Id. But Respondent has not explained why, under the ERA and regulations, it should be able to shield itself from the anti-retaliation provision of the Act. [5] If Respondent "innocently", i.e., in good faith, refuses to hire an applicant based on derogatory information supplied by another employer, the other employer may be held liable for blacklisting, but not Respondent. However, if Respondent refused to hire an applicant because he filed a complaint with the NRC against another employer, such a clear violation of the ERA and the regulations would be immunized if this release were allowed to stand. Moreover, the release would also immunize other employers who might, because of a retaliatory motive, provide Respondent false or misleading information about Complainant. I find that Respondent violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted.

Accordingly, it is ORDERED that Respondent extend an offer of employment to Complainant as a senior technician or similar comparable position, and pay Complainant back pay, with interest, less interim earnings from November 21, 1988 to the date of hire or the date of the offer of employment if Complainant declines the offer.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor
Washington, D.C.

[ENDNOTES]

[1] I note that Complainant is a layman who was not represented by counsel when the dispute over the authorization form took place. Even lawyers can disagree over the scope and effect of the language in question. It is not surprising that Complainant refused to sign a form which could easily be interpreted as a waiver of his rights under the ERA.

[2] The regulations implementing the ERA explicitly prohibit blacklisting, 29 C.F.R. 24.2(b) (1990), and the Secretary has held that blacklisting, which is "insidious and invidious [and] cannot easily be discerned," is prohibited by the ERA. *Eqenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Sec. Decision April 20, 1987, slip op. at 8. "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." BLACK'S LAW DICTIONARY 154 (5th Ed. 1979).

[3] Even in situations where waivers are permissible, a number of factors are considered and weighed together to determine whether the waiver is enforceable. *See Torrez v. Public Service Co.*, 908 F.2d at 689. I have considerable doubt whether the waiver here would have been enforceable when evaluated by some of these standards, e.g., whether Complainant was encouraged to seek, or in fact received benefit of counsel; whether there was an opportunity for negotiation of the terms of the agreement; whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law.

[4] Some courts have held that an agreement not to sue as a condition of employment is unenforceable as against public policy. *Nicholson v. Conrail*, No. 86-C-5551 (N.D. Ill. Jan. 14, 1987) (LEXIS, Genfed library, Dist. file 244, page 2), and cases cited therein. "[A] release covering all claims that might later arise between the parties 'would constitute a consent to the foregoing of legal protection for the future and would plainly be against public policy.'" *Id.*

[5] Respondent also argues that use of the authorization form in Complainant's case was not a pretext because Respondent routinely uses the form for screening all applicants. The issue here, however, is not whether use of the form was a pretext for discrimination for some other

impermissible reason. Respondent's reason for not hiring Complainant is clear. The only issue is whether that reason is itself a violation of the ERA.

Doyle v. Hydro Nuclear Servs.,
89-ERA-22 (ALJ July 17, 1989)

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

Dated: Jul 17 1989

Case No. **89-ERA-22**

In the Matter of:

SHANNON T. DOYLE,
Complainant

against

HYDRO NUCLEAR SERVICES,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This matter arises under the Energy Reorganization Act of 1974 as amended U.S.C. § 5851 (1982) and its implementing regulations, 29 C.F.R. Part 24 (hereinafter referred to as the Act). The Act prohibits any person from discharging or otherwise discriminating against an employee, who has engaged in activity protected by the Act.

STATEMENT OF THE CASE

Shannon T. Doyle, the Complainant in this matter, filed a complaint with the Wage and Hour Division, United States

[Page 2]

Department of Labor, alleging that he was discharged by Respondent Hydro Nuclear Services, Inc. because he was engaged in activity protected by the Act.

The District Director for Employment Standards Administration, Wage and Hour Division on February 23, 1989 issued its notification of findings letter, finding:

> All evidence indicates that Hydro Nuclear Services, Inc. terminated your employment solely because of your refusal to sign the firm's standard Privacy Act waiver form and not because of your prior admitted whistleblower activities. Termination of employment for the above stated reason *is not a protected activity* under the Energy Reorganization Act.

February 27, 1989, Complainant timely filed a telegraphic request for formal hearing.

A Notice for formal hearing was set for April 25, 1989 and upon Respondent's motion said matter was continued and reset for June 7, 1989. On May 16, 1989 Complainant filed Motion for Summary Judgment. On May 25, 1989, Respondent filed Countermotion for Summary Judgement. Pursuant to telephonic conference call of June 5, 1989, both parties were granted additional time to file supplemental memorandum in support of said summary judgment motions and the hearing set for June 7, 1989 was continued by the Court. Complainant's memorandum was filed and Respondent's response was also filed and both have been reviewed by me in rendering this decision.

ISSUE

HAS THE PLAINTIFF ENGAGED IN ANY ACTIVITIES WHICH ARE CONSIDERED "PROTECTED ACTIVITIES" UNDER THE ACT.

STIPULATION OF FACTS

In the Respondent's Pre-Hearing Statement the following stipulation of facts by the parties was set forth:

1. After telephone conversations with another Westinghouse staffing personnel, Shannon T. Doyle spoke to Rick McCormick, Field Personnel Coordinator, at the end of October, 1988, about working for HNS at D.C. Cook in Bridgeman, Michigan. Mr. McCormick told Mr. Doyle he would be paid .20 per mile for the drive from Mr. Doyle's home in Alabama to D.C. Cook, and, for his work at the plant, $48.00 per diem, and $6.50 per hour.

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Mr. McCormick told Mr. Doyle that he would be working 72 hours per week at D.C. Cook.

2. On November 7, 1988, at the D.C. Cook location, Mr. Doyle met Dan Haynes, HNS Plant Coordinator, who paid Mr. Doyle $182.60 for his travel mileage to Michigan. Mr. Haynes also paid him $48 for his per them for November 6, 1988, his travel date, and $336 as per them for the week of November 7th through 13th. Mr. Haynes instructed Mr. Doyle to attend training sessions at D.C. Cook on November 8th. Mr. Doyle attended those sessions.

3. On November 9th, Mr. Doyle took the Minnesota Multiphasic Personality Inventory test, a psychological test. At approximately 11:30 a.m., Mr. Doyle reported to the Cedarwood Medical Center for drug screening.

4. On a date which is in dispute, Mr. Haynes informed Mr. Doyle that the preliminary results of the drug test were positive. Mr. Haynes did not identify to Mr. Doyle the substance for which he tested positive. Mr. Haynes gave Mr. Doyle the telephone number for Rick McCormick.

5. On November 14, Mr. Haynes gave Mr. Doyle his per diem payment for the week of November 14th through 20th.

6. Mr. Doyle contacted Mr. Haynes on November 17th, at which time Mr. Haynes told him he had heard nothing further about the drug test.

7. Mr. Haynes contacted Mr. Doyle on November 18th to tell him the final drug screening test results were negative. Mr. Haynes then asked Mr. Doyle to complete an employment application. Mr. Doyle went to the plant that day to up the application. Mr. Doyle was to complete the application over the weekend.

8. In the early morning of Monday, November 21st, Mr. Doyle took the completed application to D.C. Cook. Mr. Haynes told Mr. Doyle to return at 11:30 a.m. to receive his per diem payment.

9. The employment application included an Authorization for Release of Information and Records form (a copy of which is attached hereto and marked ALJ Exhibit #1). Mr. Doyle had crossed out the second paragraph of the form and then signed it.

10. Later that day, Mr. Doyle spoke with Robert Booker to express his reluctance to sign the authorization form. Mr. Doyle stated that he would sign it provided the second paragraph was deleted or amended to retain his rights under the Energy

[Page 4]

Reorganization Act. Mr. Booker told Mr. Doyle that, unless he

signed the release form in its entirety, HNS would cease any further consideration of employing him. When speaking to Mr. Booker, Mr. Doyle mentioned a previous whistleblower incident in which he was involved.

11. Mr. Doyle told Mr. Booker that he planned to return to his home in Alabama. He also asked that Mr. Booker make certain that he receive all of the money owed him. Mr. Doyle was not paid at that time for his trip home.

12. After Mr. Doyle left Michigan, Dan Haynes sent him a money order in an amount equal to the payment for his mileage to Michigan, that is, $182.60. He also sent Mr. Doyle a second money order in the amount of $48 as his final per diem payment.

For purposes of ruling on the motions for summary judgment, the respondent has agreed to allow me to assume that Complainant was an employee of Hydro Nuclear Services.

DISCUSSION

Complainant in his Motion for Summary Judgment argues that Complainant's refusal to sign the unaltered release form was an attempt by him to protect and preserve Complainant's rights and therefore was a protected activity under the Act. He further argues that a mandatory requirement that all personnel sign such a release is discriminatory in nature since "a person who may consider an action would give up his right to initiate that action." In Complainant's supplemental memorandum of June 7, 1989, he contends that Respondent had three separate and different authorizations all of which satisfy the requirements of the Privacy Act and the applicable standards of the American National Standard on Security for Nuclear Power Plants (ANSI/AN-33). Complainant contends that there is no requirement that an individual "release anyone from any and all liability as results of furnishing or receiving (any)

information." He further argues that Respondent's position that the release includes such a waiver so as to allow a former employer to speak freely without fear of legal retribution, runs counter to the employee protection provisions of the ERA.

Respondent in its Countermotion for Summary Judgment contends that Complainant's refusal to sign the unaltered release form is not a protected activity. In order to protect against a threat from someone inside the company, a comprehensive screening program in accordance with ANSI is required; including the obtaining of signed releases from the individual to obtain the necessary information. Respondent argues that the second paragraph

[Page 5]

of the standard release form (which Complainant struck out) merely releases and discharges Respondent and any organization listed in the first paragraph of the release, furnishing or receiving any information pertaining to the individual "only from any liability or claim resulting from furnishing or receiving such information pursuant to the I authorization." Respondent further argues that:

> the employer should be able to protect itself against any claim arising out of the innocent, but necessary provision or receipt of information. . . Moreover, the release is extremely narrow and only applies to that which flows from the act of turning over records to the Respondent. It does not release anyone from any illegal acts under the ERA or Atomic Energy Act.

I agree with this last argument by Respondent. Complainant has misconstrued the effect of the language of the release. He incorrectly believes that his release would jeopardize any "whistleblower" remedies he may be pursuing against other entities. I totally agree with Respondent's analysis

of the legal effect of the release in question. Moreover it would be against public policy to allow an employer to be relieved of liability under the Act by reason of obtaining an employee's signed release. Complainant had he signed said release, would not have released any of his rights to pursue whistleblower remedies. I thus find that his refusal to sign said unaltered release was not a protected activity under the Act. I further find no merit in Complainant's argument that Respondent had three signed releases which satisfied past ANSI standards. Those three releases did not contain the language which Complainant had refused to sign namely the "release of liability" language. Respondent had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post record. Since Complainant refused to accept this requirement I find that this Respondent had a legal right to refuse to employ Complainant. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. This Respondent in requiring all employees including Complainant to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.

In conclusion I recommend to the Secretary of Labor that the Complainant's Motion for Summary Judgment be denied and that an Order and Decision granting Respondent's Motion for Summary Judgment be issued and that the complaint of Shannon T. Doyle should be dismissed.

RICHARD D. MILLS
Administrative Law Judge
Metairie, Louisiana

HYDRO NUCLEAR SERVICES, INC.

1256 N CHURCH STREET MOORESTOWN, NJ 08057
(609) 722-5700

AUTHORIZATION FOR RELEASE OF INFORMATION AND RECORDS

In accordance with the Privacy Act (5U.S.C. 552a), I, the undersigned, expressly authorize any person, association, firm, company, criminal justice agency, Credit Extending Organizations, schools, ILLEGIBLE or Hospitals, Department or agency of a City, County, or State Government, or the Federal Government to release and furnish to Hydro Nuclear Services and its authorized representatives any and all information and records, reports, transcripts, abstracts, military records, criminal records, or any other information.

Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of furnishing or receiving such information pursuant to this authorization.
Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations.

A photo copy of this authorization shall be deemed an original and shall be accepted as such by any person or organization.

Name Printed _____
Date_____
Date of Birth_____(Furnished for reasons of positive

I.D.)
Social Security #_____
Present Address_____
How Long_____
Signature_____

SECTION 210 OF THE ENERGY REORGANIZATION ACT

UNITED STATES PUBLIC LAWS
95th Congress - Second Session
Convening January 19, 1978

PL 95-601 (S 2584)
NOVEMBER 6, 1978

42 U.S.C. § 5851 "EMPLOYEE PROTECTION"

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee),

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other

manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

(b) (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the 'Secretary') alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) (1) Any person adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Whenever a person has failed to comply with an order issued under subsection (b) (2), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory and exemplary damages.

(e) (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28 of the United States Code.

(g) Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended.

Route 7 Box 254-B
Dothan, Alabama 36301
(205) 677-3686
December 9, 1988

Larry Monk
United States Department of Labor
Wage and Hour Division
100 West Troy Street
Dothan, Alabama 36301

Dear Mr. Monk,

On Sunday, October 30, 1988, I was contacted by a woman from Numanco, a division of Westinghouse which supplies support personnel to nuclear facilities. I was asked if I would be interested in working at the D.C. Cook Nuclear Plant. I informed her that I would be interested and she had me call Mr. Rick McCormick of Hydro Nuclear Services (H.N.S.), another division of Westinghouse, at 1-609-722-5829. Mr. McCormick informed me that he was authorized to offer me $48.00 per diem, .20 per mile transportation each way, and $6.50 per hour as a senior technician. I then asked him if I could get more on the hourly rate and he stated that he would have to get authorization from a manager and that I should talk to him on Monday, October 31.

I contacted Mr. McCormick on Monday and he informed me that $6.50 per hour was the maximum he could offer, but he guaranteed me 72 hours per week. I accepted his offer and he told me to report to Dan Maynes at the plant at 8:00 a.m. on Monday, November 7. When I arrived, Mr. Haynes made arrangements to meet me later that morning in order to reimburse me for my travel and to give me my per diem.

During this meeting Mr. Haynes informed me that I was scheduled for in-process training on Tuesday, November 8. When I inquired as to when I would be going to work, he informed me that he had been informed that my background screen was already on someone's desk in New Jersey and that he thought I would probably go to work Thursday night, November 10. During the next 2 days I completed the training, making 100 % on all four of the tests given, and I passed the standard psychological test. At 11:30 a.m., Wednesday, November 9, I gave a urine specimen for the purpose of drug screening. I contacted Mr. Haynes Thursday morning at 1-616-465-5336, to see if my physical and lung-function test could be performed before going to work that evening. Mr. Haynes then informed me that I had tested positive for a substance on my urine sample. I asked him what the substance was and he informed me that he had been directed not to identify it. I expressed some doubt as to the accuracy of the analysis, and Mr. Haynes stated that further evaluation would be necessary to determine my eligibility for further employment. He also informed me that I would not be paid for any hourly wages from that point in the conversation until the evaluation allowed me to be further employed. I asked him if I would be paid from that point if the test proved negative and he informed me that I would be paid retro-actively if the test was OK. I asked Mr. Haynes how I could find out what the substance was and he directed me to Mr. McCormick.

After several attempts to contact Mr. McCormick leaving messages in vain for him to call me, I was finally able to contact him on Friday, November 11. I asked him to identify the substance and he informed me that he did not know but, would find out. I was put on hold and when Mr. McCormick returned, he told me the substance was THC, the active

ingredient in marijuana. I informed Mr. McCormick that the results were false, as I did not use illegal drugs, nor did I associate with those who did, and that I, the father of 4 school age children, was as opposed to that activity as any father should be. Mr. McCormick expressed a good bit of confidence in the test results and stated that he knew of no previous incidents where they were wrong.

I then questioned the motive of the test results, informing Mr. McCormick of my previous whistle blower status and the extreme difficulty I had experienced in obtaining further nuclear industry employment. I then told him of my intent to have another analysis performed.

I contacted Dr. Richard Jensen's office and arrangements were made for me to be tested in a Chicago medical laboratory. I gave the specimen in the presence of the laboratory director within 52 hours of the first specimen and within 4 hours of Mr. McCormick's finally telling me what the substance was.

On Monday, November 14, I informed Day Haynes that Mr. McCormick had been able to find out what the substance was. Mr. Haynes then informed me that Mr. McCormick knew all along what the substance was because he was the one that directed Mr. Haynes not to give me the information.

I then expressed some concern that I could be incriminated without being told exactly why, and then I informed Mr. Haynes that if the preliminary results of my first drug screen were said to be accurate while the drug screen in Chicago indicated that they were not, then I would have no choice but to file a complaint with the DOL.

On Thursday I received the results of the Chicago drug screen which, as expected were negative. I then called Mr. Haynes and asked if the further evaluation of my first drug-screen had been completed. He informed me that he had no news concerning the matter. He then asked about the Chicago

test and I informed him of the results. I then expressed concerns as to how I could test positive on the high scale of one test yet 2 days later test negative on both the high scale and the low scale.

On Friday, November 18, Mr. Haynes contacted me and told me that after further evaluation my first test was OK, however, I would have to fill out another employment packet because they were unable to locate the original, which included copies of my birth certificate, DD 214, college transcripts and radiation exposure records, that I had submitted previously in order to be offered the job in the first place. I was beginning to wonder if I would ever get into the plant to work. Mr. Haynes reiterated that I would be paid for the time I was waiting for the test results and he would go back and pick me up on the time sheets.

I went to the plant and Mr. Haynes gave me the packet to fill out over the weekend. Included in the material was authorization for release of information and records (enclosure 1). The second paragraph of this document included provisions that I felt would waive my rights to file any blacklisting complaint with the DOL based on information that was received from a former employer. I also realized that f H.N.S. had a change of heart regarding my drug screen, I would have no recourse.

I lined out the highlighted paragraph, signed the document, and returned it along with the completed employment packet on Monday, November 21, at about 7:00 a.m. I was told by Mr. Haynes to return at 11:30 for my per diem payment. When I returned I was asked to sing another copy of enclosure 1 in it's entirety. I expressed reluctance and was told to contact Bob Booker, who was identified as a Westinghouse attorney. At about 12:30, I contacted Mr. Booker at 1-800-556-7572 ext. 5837. He stated that he was unable to discuss the matter at that

time, and would call me back. Dan Haynes then informed me that he had been directed not to pay me my per diem until I signed the document.

Mr. Booker returned my call later that afternoon and I informed him of my hesitance to sign anything that would, in effect, be a waiver of my rights under the Energy Reorganization Act. I informed him of my previous whistle blower status and the difficulties I had experienced in obtaining further nuclear industry employment. I also expressed some concern that I had been at the plant site going into my third week without being granted access.

Mr. Booker inquired as to whether or not I had any intention of taking any action against H.N.S., and I informed him that if I felt I was being discriminated against by anyone because of my protected activities as defined under the ERA, that it was my right to file against that party. I further expressed my opinion that an offer of further employment that was contingent on my waiving that right may be in opposition to the congressional intent expressed by the passage of the employee protection statutes of the Energy Reorganization Act.

I declined to sign the document unless amended. Mr. Booker stated that because of my failure to sign the document in its entirety, they no longer had a position available to offer me. I asked Mr. Booker if he was an attorney and he replied that he was not. I stated that he may wish to consult one and if necessary I could be reached at my home in Alabama. I asked Mr. Booker to see that before I left, I received the monies due me. He stated that he would contact Mr. McCormick to determine what my entitlement were. Within 30 minutes Mr. Haynes exited the plant and informed me that he had been directed not to give me any compensation whatsoever. I then returned to Alabama with very little

money.

I feel that the language of the ERA is very clear in this matter. In short, it states that no employer may discharge an employee because that employee is about to commence a proceeding under the employee protection statute of the ERA.

Furthermore, I feel that Mr. Booker's actions are extremely questionable in that there were the threats of my no longer being employed and withholding compensation due me unless I waived my rights. These threats were carried out.

Even if it is contended that all Westinghouse personnel are required to sign such a "yellow dog" release, I feel that the language of the ERA should supercede such a requirement so as to allow whistle blowers to pursue their rights in order to combat blacklisting tactics.

I request an inquiry be performed.

Sincerely yours,

Shannon T. Doyle

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 28, 1995

EA 95-080

Hydro Nuclear Services, Inc.
Moorestown, New Jersey

SUBJECT: NOTICE OF VIOLATION (U.S. Department of Labor Case 89-ERA-022)

Gentlemen:

This refers to the results of an administrative proceeding conducted by the U.S. Department of Labor (DOL) which involved a complaint of employee discrimination filed by an applicant for employment with Hydro Nuclear Services. This complaint was filed under the provisions of Section 210 of the Energy Reorganization Act of 1974, as amended (ERA) (recently changed to Section 211 by the Energy Policy Act of 1992). The DOL proceedings consisted of an investigation, an administrative hearing conducted by a DOL Administrative Law Judge (ALJ) and a final order issued by the Secretary of Labor finding that discrimination occurred in the case. As a result of the DOL proceedings and findings, the Nuclear Regulatory Commission (NRC or Commission) has concluded that a violation of Section 210 and of NRC regulations occurred, specifically a violation of 10 CFR 50.7, which prohibits discrimination against an employee or applicant for

employment for engaging in activities protected by the ERA.

The violation described in the enclosed Notice of Violation (Notice) concerns the findings of discrimination made by the Secretary of Labor in DOL Case No. 89-ERA-022, captioned as Shannon T. Doyle v. Hydro Nuclear Services. In this case, the Secretary found that Hydro Nuclear Services "violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted." The Secretary required that Hydro Nuclear Services offer employment to Mr. Doyle as well as back pay with interest.

According to the Secretary of Labor, the form, called an Authorization for Release of Information and Records, would have "released [Hydro] and any other employer from whom [Hydro] obtained information about [Doyle] from any claim that the information had been provided or used to deny [Doyle] employment because of protected activities under the ERA." Saying that "employees may reasonably believe that they have no protection under the ERA and will be afraid to speak out about safety problems," the Secretary concluded that Hydro Nuclear discriminated against Mr. Doyle.

The NRC adopts the final Secretary of Labor decision in this case and finds that a violation of 10 CFR 50.7 occurred when Hydro Nuclear Services refused to hire Mr. Doyle after his refusal to sign a waiver form in his application for employment. Under 10 CFR 50.7, discrimination by a Commission licensee or a contractor of a Commission licensee is prohibited. In accordance with the "General Statement of Policy and Procedure for the NRC Enforcement Actions," (Enforcement Policy), 10 CFR Part 2, Appendix C, the violation has been categorized at Severity Level III.

You are requested to respond to this letter and should follow the instructions specified in the enclosed Notice of

Violation when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be placed in the NRC Public Document Room.

The responses directed by this letter and the enclosed Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub.L. No. 96-511.

Should you have any questions concerning this letter, please contact us.

Sincerely,

R. Lee Spessard, Director
Division of Technical Support

NOTICE OF VIOLATION

Hydro Nuclear Services
Moorestown, New Jersey EA **95-080**

Based on the results of an investigation and administrative hearings conducted by the U.S. Department of Labor (DOL) related to DOL Case No. 89-ERA- 022 that involved employee discrimination, and the resulting order of the Secretary of Labor dated March 30, 1994, the NRC has determined that a violation of its regulations occurred. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," (Enforcement Policy), 10 CFR Part 2, Appendix C, the violation is listed below:

Section 210 of the Energy Reorganization Act of 1974, as amended, (ERA) and 10 CFR 50.7 prohibit discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee or applicant against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, or privileges of employment.

Contrary to the above, on October 30, 1988, a technician was offered a job by Hydro Nuclear Services at the D.C. Cook Nuclear Plant. The technician accepted the job and was told to report to work at the D.C. Cook plant on November 9, 1988. During employment screening, the technician refused to sign a form that included a paragraph that would have waived his rights under the ERA. The Secretary of Labor concluded that this constituted discrimination in violation of Section 210 of the ERA and ordered that Hydro Nuclear Services offer Mr. Doyle a comparable position and pay back wages with interest.

Severity Level III violation (Supplement VII)

Pursuant to the provisions of 10 CFR 2.201, Hydro Nuclear Services is hereby requested to submit a written statement or explanation to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Division of Technical Support, Office of Nuclear Reactor Regulation, within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each violation: (1) the reason for the violation or, if contested, the basis for disputing the violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved. Where good cause is shown, consideration will be given to extending the response time. Under the authority of Section 182 of the Act, 42 U.S.C. 2232, this response shall be submitted under oath or affirmation.

Supreme Court, U.S.
FILED
SEP 26 2002
OFFICE OF THE CLERK

(2)

No. 02-297

IN THE

Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICI CURIAE* OF NORTHWEST ENVIRONMENTAL ADVOCATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In this case, the Secretary of Labor interpreted Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 92 Stat. 2947 (1978), 42 U.S.C. § 5851(a), finding that Petitioner's "protected activity" includes his refusal to sign a pre-employment agreement, which he reasonably believed forced him to prospectively waive his statutory rights. In the decision below, a divided panel of the United States Court of Appeals for the Third Circuit afforded the Secretary's determination no deference and ratified the employer's use of a waiver of statutory rights as a condition of employment. This case therefore presents the following questions:

1. Whether an employee may be required to prospectively waive substantive rights under the ERA as a condition of employment;

2. Whether the legality of a prospective waiver should be judged from the point of view of a reasonable employee; and

3. Whether the Secretary of Labor's determination, that an employee's refusal to sign a prospective waiver of substantive rights amounts to "protected activity" under the ERA, is entitled to *Chevron*-type deference.

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IN THE

Supreme Court of the United States

No. 02-297

SHANNON T. DOYLE,

Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF NORTHWEST ENVIRONMENTAL ADVOCATES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

A. The *amici.*

Northwest Environmental Advocates [1] is a private non-profit organization. For over 30 years, it has worked through advocacy and education to protect and restore water and air

[1] The *amici* submit this brief with the consent of the parties, including the petitioner Shannon Doyle, respondent Hydro Nuclear Services, and the Solicitor General of the United States. The original consents are filed with the Court. Pursuant to Rule 37.6, counsel states that no party to this proceeding, nor any counsel for any party, authored any part of this brief. Moreover, the full costs for the preparation and submission of this brief were paid by the *amici curiae*, or their counsel.

quality, wetlands, and wildlife habitat and to stimulate the development of renewable energy sources to replace fossil and nuclear fuels in the Pacific Northwest. The Northwest Environmental Advocates depends on whistleblowers to discover environmental threats.

The Government Accountability Project (GAP) is a non-profit nonpartisan public interest law firm whose mission is to provide support for whistleblowers. Whistleblowers are employees who exercise free speech rights to challenge institutional abuses of power that betray the public trust. GAP has lead the successful outside campaigns for passage of the Whistleblower Protection Act of 1989 for federal employees, numerous state and local whistleblower statutes, the Military Whistleblower Protection Act for armed services members, and corporate whistleblower laws ranging from the nuclear weapons and power industry to the airline industry. This summer GAP lead the outside campaign for comprehensive whistleblower protection in the Public Company Accounting Reform and Investor Protection Act of 2002. GAP has participated either as counsel or *amicus* in all major cases interpreting federal whistleblower statutes.

The Nuclear Information and Resource Service (NIRS) is the information and networking center for citizens and environmental organizations concerned about nuclear power, radioactive waste, radiation, and sustainable energy issues. NIRS investigates and exposes safety problems at nuclear reactors, monitors every reactor in the U.S. and, to the extent possible, in Eastern Europe, closely watches nuclear regulators and intervenes in policy issues whenever necessary, and provides technical assistance to organizations across the world. Information provided by whistleblowers within nuclear industries, such as Shannon Doyle, are a necessary source of information about safety and compliance issues. Accordingly, any employer attempting to identify or discriminate against whistleblowers undermines the work of NIRS.

Furthermore, NIRS depends on the law of the United States to set an example for other nations on the standards for nuclear safety and employee protections.

The Northwest Environmental Defense Center (NEDC) is an independent non-profit organization that has been working since 1969 to protect the environment and natural resources of the Pacific Northwest. NEDC is located in Portland, Oregon on the campus of Northwestern School of Law of Lewis and Clark College. It provides legal support to individuals and organizations with environmental concerns, and engages in litigation independently or in conjunction with other environmental groups. NEDC also provides valuable hands-on experience for students seeking to enhance their education in environmental law.

The Southern Appalachian Biodiversity Project is a non-profit regional organization dedicated to the native biodiversity of the Southeast. Since 1990, SABP has taken legal action to protect critical habitats and assure full enforcement of conservation laws on public lands. SABP publishes *Wild Mountain Times* to serve as a voice for conservation of Southern Appalachia. As part of its mission to protect public lands, SABP is concerned about timber theft from national forests. Such theft is hard to detect or track. Whistleblowers are essential to discover such thefts and identify the perpetrators. SABP relies on whistleblower protections to prevent the abuse of national forests and the people who can conserve them.

The Strategic Counsel on Corporate Accountability is a legal consulting firm established in 1998 to advise unions, environmental organizations, citizens groups and investors aspiring for corporate responsibility and accountability. Clients seek assessments of firms in the health care, energy, communications, mineral extraction and manufacturing sec-

tors. The ability of employers to require a waiver of whistleblower rights could frustrate accountability for environmental, safety and civil rights abuses. The firm has identified corporate breaches of the duty to disclose environmental and human rights issues of material interest to investors. The newly enacted 18 U.S.C. § 1514A protects employees from retaliation for certain activities in the enforcement of securities law. Therefore, the Counsel has particular concern for the potential to undermine a whistleblower's right to seek new employment without losing or even disclosing whistleblower claims against former employers. Such protections are urgently needed to improve corporate responsibility on Wall Street. If the decision below stands, it would deter workers from reporting securities law violations.

The Tri-State Environmental Council (TSEC) was formed in January 1991 to eradicate social and environmental injustice. It is a non-profit grassroots citizen's organization with activities in Ohio, Pennsylvania and West Virginia. Currently, TSEC is monitoring the operation of Waste Technologies Industries (WTI), one of the largest commercial hazardous waste incinerators. WTI is sited in an impoverished minority neighborhood in East Liverpool, Ohio. TSEC educates the public about WTI, and the enforcement opportunities of the state regulatory agency. It collects information on the day-to-day operation of WTI and other noxious facilities and checks their compliance with government-issued permits. It then monitors enforcement by the regulatory agencies. Accurate primary source information enables the public to make more informed decisions about the facilities that will directly impact human health and the environment. Whistleblowers help by bringing violations to light that may have gone unreported by the employer. Whistleblowers help keep their employers honest, which in turn makes for a healthier relationship with the community. TSEC is concerned about the deterrent effect of the decision below. To the extent that potential whistleblowers are

worried about retaliation and their future career, the flow of information to the public will suffer. If the opinion below stands, employers will strip whistleblowers of their legal protection against discrimination and retaliation. Employers would correctly feel that they are less accountable, and that the courts would be on their side. Area citizens will not have the full record as they seek accountability from area businesses and environmental enforcement authorities.

The Whistleblower Society of America is dedicated to protecting the rights of free expression and association as exercised by whistleblowers. The Society is particularly concerned about impediments that prevent whistleblowers from obtaining their legal protections. By offering support to whistleblowers, the Society hopes those individuals with knowledge of health and safety dangers will have the courage to come forward and report. It is the mission of this Society to protect whistleblowers from any form of retaliation or discrimination that may silence them. The waiver Hydro presented to Doyle in this case is precisely the type of impediment and discrimination that can silence whistleblowers. The Society believes that our nation has a moral obligation to stand beside the individual who comes forward and discloses a danger of lethal radiation. When our government fails such an individual, it fails us all. The Whistleblower Society of America therefore urges the Supreme Court of the United States to hear this case.

Montana-CHEER (Coalition for Health, Environmental & Economic Rights) is a coalition of citizen groups seeking to reduce pollution in western Montana, promote healthy communities, and advocate for safe work places. The coalition needs employees to speak up when they learn about unlawful pollution through their work. When employers use a waiver of rights form, those employees would be chilled.

B. Use of a pre-employment waiver chills employees from engaging in protected activities.

One of the most frustrating experiences for an environmental attorney is to call a prospective witness and hear, "I can't afford to lose my job." While Congress might pass any number of laws to protect employees from discrimination and retaliation, or to protect the environment, public health and safety, or the public coffers from fraudulent claims, these rights are of little use in cases where every prospective witness is afraid of making the boss mad. Ironically, where employers have acted most outrageously to punish employees who speak truth to power, the fear of retribution is at its highest.

By counseling clients, undertaking representation, and preparing cases for trial, environmental lawyers give life to those laws enacted to accomplish public policies. The primary purpose of our system of public trials is to ascertain the truth. Environmental lawyers are frustrated in this primary purpose every time a prospective witness refuses to say what the eyes have seen or the ears have heard. The public policy is frustrated when legal protections fail to give confidence to prospective witnesses about their future economic security.

As today's employment market becomes increasingly mobile, a prospective witness's economic security depends less on the good will of the present employer, and more on that individual's ability to retain new employment in the marketplace. In this context, the decision of the Third Circuit below is particularly distressing to environmental lawyers. The Circuit Court opinion provides a blueprint to all employers who want to frustrate legal claims by employees. According to the decision below, employers face no liability for testing prospective employees on their willingness to abandon legal claims of retaliation against their past

employers. To justify this result, the Third Circuit imputes to prospective employees knowledge that courts would not enforce the release.

Who would be concerned about signing such a release? Only those employees who blew the whistle on a former employer would now fear the equivalent of a black list—a negative reference resulting from the employee's past participation in proceedings to enforce the law. The opinion below sanctions the equivalent of a photograph requirement on employment applications. While an employer can readily tell an applicant's skin color from the photograph, a device such as the pre-employment release is required to identify those employees who care more about the law than about protecting their supervisors from accountability. Already, at least one human resources organization is promoting the Third Circuit opinion, and touting the exact language of the release it approves.[2]

At stake is the ability of every trial lawyer to prepare any type of case that depends on the openness and veracity of employee witnesses. Can employers use the pre-employment release as a sword of Damocles to deter all employees from asserting their legal rights, or testifying truthfully about employer misconduct? To answer this question, the *amici* urge this Court to grant the petition for writ of certiorari of Shannon Doyle.

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[2] See http://www.hrcomply.com/newsletter/040302/10.html.

ARGUMENT

I. AN EMPLOYER'S REQUIREMENT THAT A PROSPECTIVE EMPLOYEE SIGN A RELEASE OF CLAIMS ARISING FROM PROTECTED ACTIVITY, CONSTITUTES UNLAWFUL DISCRIMINATION IN VIOLATION OF THE ENERGY REORGANIZATION ACT OF 1974, 42 U.S.C. § 5851.

A. Whether or not a pre-employment release is enforceable as a contract is immaterial to the question of whether its use constitutes unlawful discrimination against whistleblowers.

Doyle's claim arises under 42 U.S.C. § 5851(a). Through this section, the Energy Reorganization Act (ERA) provides that no employer may discharge or otherwise "discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee" engaged in any of the activities protected under the Act. The ERA protects not only reporting alleged nuclear safety violations, but also refusing to engage in any practice made unlawful by the ERA. It is through this law that our federal government protects those employees who place lawful operation of nuclear facilities above the happiness of their individual supervisors.

The employee protection provision of the ERA is comparable to those in seven other federal environmental laws.[3]

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[3] The eight federal environmental laws with employee protections are the Water Pollution Control Act (WPCA, commonly called the Clear Water Act), 33 U.S.C. 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); Toxic Substances Control Act (TSCA), 15 U.S.C. 2622; Solid Waste Disposal Act (SWDA, also called RCRA), 42 U.S.C. § 6971; Clear Air Act, 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law") , 42 U.S.C. § 9610; the Energy Reorganization Act of

Each of them depends on the employee protections to accomplish their primary enforcement purposes. See *Passaic Valley Sewerage v. United States Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) ("Such 'whistle-blower' provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment . . . .").

It is hard to imagine any law that is more important to public health and safety. Sixth Circuit Judge George Edwards, Jr., wrote that the intent in passing the ERA was to "encourage employees" to report "unsafe practices in one of the most dangerous technologies mankind has ever invented." *Rose v. Secretary of Department of Labor* (6th Cir. 1986), 800 F.2d 563, 565 (J. Edwards concurring). He explains:

> If employees are coerced and intimidated into remaining silent when they should speak out, the result can be catastrophic. Recent events here and around the world underscore the realization that such complicated and dangerous technology can never be safe without constant human vigilance. The employee protection provision involved in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances.

As this case hinges on application of a statute, a careful look at the wording of that statute is necessary to discern its purpose and scope. The key word in this provision of the ERA is the word "discriminate." To "discriminate" means, "to make a clear distinction; distinguish; differentiate; or (2) to act on the basis of prejudice." This is what an employer does when it uses a pre-employment release. For the employer's chilling effect, the contractual enforceability of the

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1974 (ERA), 42 U.S.C. § 5851; and the Surface Transportation Act (STA), 49 U.S.C. § 31105.

release is of no consequence. It is a test of submission, a loyalty oath, a way to distinguish those who will freely abandon rights guaranteed by public policy in favor of unfettering the employer's power over them.

The Circuit Court below incorrectly analyzed this case by asking the question of whether Doyle's refusal to sign the pre-employment release was "protected activity." A proper preliminary question is whether the employer's use of the pre-employment release constituted discrimination. The answer to that question is clearly yes. By presenting the pre-employment release, the employer effectively separated applicants into two groups: (1) those who freely abandon their employment rights; and (2) those who are concerned about the law. By clarifying which applicants have no concern about such a release, and which applicants balk, the release becomes a yellow star marking those whose career is destined for elimination. It is the initial act of distinguishing, of making clear which side the applicant is on, that the ERA prohibits.

Indeed, it is incorrect to say that a prima facie case of retaliation requires a showing of protected activity at all. An employer subjected to a law enforcement investigation might mistakenly retaliate against an employee who engaged in no protected activity. That employee is still protected from "discrimination" on account of identification, albeit mistaken, as a whistleblower. *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994); *Brock v. Richardson*, 812 F.2d 121, 123-25 (3d Cir. 1987).

The analysis of whether any such release is enforceable under principals of contract law is wholly immaterial to the issue at hand: does an employer "discriminate" by asking a prospective applicant to sign any document repudiating statutory claims against prior employers?

B. The decision of the Secretary of Labor is entitled to deference as it arises within the scope of authority conferred on the Secretary.

It is well established that agencies charged with enforcing a specific law are entitled to deference toward their interpretations of that law. Accordingly, we pay deference to the Secretary of Labor in construing the statutes she is charged with administering. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). The Third Circuit adds that "we owe no deference to an erroneous conclusion of law[.]" *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002), at A17 of Doyle's petition, citing *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997). The Court below states both holdings as if it has discretion about which to apply. Review on certiorari can assist the courts below, and practitioners, in drawing the line between questions on which agencies are entitled to deference, and questions on which the court's legal analysis is superior. This Court may appropriately explain that on matters central to the law administered by the agency, and for which Congress has not specifically directed a contrary holding, the agency is entitled to deference.

The Third Circuit honed on the question of whether Doyle's refusal to sign the pre-employment release constituted "protected activity." There can be no question more central to the administration of 42 U.S.C. § 5851(a) than the question of what activity is protected. It is this provision's reason for being—to protect activity by employees that assists in enforcement of the law.

Identifying what employee actions are "protected activities" is at the core of the Secretary's administrative responsibilities for enforcing the whistleblower laws. The Secretary's offices have the experience in this field from

which the workability of the Secretary's interpretation is best determined. The Secretary's interpretation is, therefore, entitled to deference.

C. Doyle's action of refusing to engage in unlawful conduct is protected activity.

The ERA provides explicitly in 42 U.S.C. § 5851(a) that a refusal to engage in conduct that is unlawful under the ERA is protected activity.[4] As the ERA prohibits unlawful discrimination against whistleblowers, then refusing to cooperate with such discrimination is, itself, protected activity. Employers will complain that this is a circular and self-serving argument. However, the refusal to cooperate in discrimination can be the most effective deterrent. To continue the yellow star analogy, when Danish people of all faiths wore yellow stars, they effectively prevented Nazi discrimination against Jewish people. When workers refuse to disclose who blew the whistle, their activity protects those who enforced the law. For any employer who seeks to evade the law through cover-up, a worker's refusal to participate in retaliation is as effective as a loud whistle in revealing who would not lie on request.

D. Hydro's pre-employment release did unlawfully seek a release of Doyle's claims under the ERA.

The release at issue asked Doyle to:

> release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me

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[4]"Protected activity" under the Civil Rights Act of 1964 includes a refusal to engage in unlawful discrimination or retaliation. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983).

> *from any and all liability or claim* as results [sic] of furnishing or receiving such information pursuant to this authorization. [Emphasis added.]

The Third Circuit majority opinion described this clause:

> Yet the release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[] of furnishing or receiving such information pursuant to this authorization." This limited purpose was consistent with the authorization's provision waiving rights to privacy in its first paragraph. Furthermore, the third paragraph of the authorization confirms the limited purpose of the release by authorizing Hydro to use the information for the enumerated purposes ("evaluation" and "eligibility for clearance") without suggesting that an employment applicant released Hydro from liability under the ERA if it made an unlawful employment determination. *The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization.* It merely released potential claims for privacy infringement. [Emphasis added.]

The release asked Doyle to say that he was releasing Hydro and the providers of information "from any and all liability or claim . . . ." It is a mystery how the decision below can say that this release "*did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA* . . . ." In the future, when courts decide they must reverse an agency decision on grounds that it was incorrect as a matter of law, we might hope that the court is correct in its reading of the applicable document. The document itself is not "facially neutral" if it requires a waiver of protected rights, along with all other rights and claims. It is overbroad to the point that it includes an unlawful provision—a requirement that the applicant waive rights protected by the ERA. Indeed, the ERA prohibits the

employer from even knowing that such applicant engaged in protected activity. The use of an overbroad release is unlawful precisely because it requires applicants to identify themselves if they have any interest in preserving their rights based on past protected activities.

The opinion below argues that the Secretary should not construe the release to be unlawful if it was capable of a lawful interpretation.[5] The court rewarded the employer for writing a release that would make whistleblowers identify themselves, yet be sufficiently vague to escape liability. The court below has turned upside-down the ancient maxim that ambiguity is construed against the drafter.[6]

The release at issue has no relevant ambiguity. On its face, it gives the employment applicant notice that this employer expects a level of subservience that would lead the applicant to waive his or her rights against all past employers. This alone is sufficient to trigger the protections of the ERA. Without such protections, employees everywhere must more seriously ponder the effect on their career if they ever dare speak a discouraging word.

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[5] The majority opinion, in a footnote, added that, "we do not find the release to be ambiguous."

[6] Ambiguities in contracts are construed against the drafter of the contract, as set forth in the Restatement (Second) of Contracts, Section 206. A latent ambiguity will be construed against the drafter if the nondrafter's interpretation is reasonable. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992), citing *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988). See also, *Regents of the University of Michigan v. Employees of Agency Rent-A-Car Hospital Association and Agency Rent-A-Car Employees Health Care Plan*, 122 F.3d 336 (6th Cir. 1997).

E. The employer's proffered reason for seeking the pre-employment release is not legitimate.

The majority opinion below advanced a second independent reason for vacating the Secretary's decision. The court held that an employer has a legitimate interest "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees . . . ." The court below has ignored the effect of the ERA in limiting what information an employer may "legitimately" have and which it may not. While nuclear safety employees must be screened for their training,[7] abilities and experience, they may not lawfully be screened on their past protected activity.

The court below assumed that the existence of a regulatory structure for security clearances means that the employer has a legitimate interest in any and all information about the applicant. This assumption is not fully considered. Obviously, the prospective employer still has no need to ask about the applicant's race, for example. Equally so, the employer has no lawful right to ask the applicant or others about the applicant's past protected activities.

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[7] As noted by Judge Bright in his dissent below:

> Hydro did not need the waiver of liability to get the information it required about Mr. Doyle. The screening procedures of the American National Standard on Security for Nuclear Power Plants (ANSI) indicate that all the background information necessary to meet the ANSI standard can be obtained through a simple release; there is nothing in the standard or screening requirements that requires a waiver of liability. The Secretary makes this point forcefully: "Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability." JA at 21.

The employer's proffered explanation, therefore, is not legitimate. The waiver is not lawful if it seeks information about protected activities.

CONCLUSION

The court below identified the applicable body of law by stating, "we will not distinguish ERA actions from claims arising under analogous anti-retaliation statutes." Indeed, a unified body of law interpreting anti-retaliation statutes can serve a variety of public interests. Why should those who reveal unlawful race discrimination need to consult a different body of law than is used by nuclear whistleblowers, or truck drivers who honestly log their driving and sleep time, or claimants for overtime, or persons who report a fraud on the federal government? Those who would courageously challenge entrenched powers on grounds that are protected by law and public policy deserve a consistent body of law.[8]

The decision below, therefore, is a danger not just to nuclear safety, but also to any statutory program that depends

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[8]This Court has similarly adopted a unified body of law for the award of attorney fees pursuant to the wide variety of laws that provide for such awards to assure private enforcement of public policy. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Congress is using the model of the federal environmental laws as a pattern for other employee protections. For example, employees who assist in enforcement of aviation safety laws now have a remedy under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. Employees reporting fraud within publicly traded companies are protected under the Public Company Accounting Reform and Investor Protection Act of 2002, 18 U.S.C. § 1514A.

on employee witnesses for its enforcement. It is a danger to our system of trial justice. The *amici* urge this Court to grant the petition and issue the writ of *certiorari*.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*, PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH and NEW JERSEY WORK ENVIRONMENT COUNCIL IN SUPPORT OF PETITIONER

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I. INTEREST OF THE AMICI CURIAE[1]

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) is a non-profit organization of 150 local unions representing approximately 150,000 workers in the greater Philadelphia area. Established in 1975, it has provided education and training about job safety and health rights to tens of thousands of workers in its 27 year history. These educational programs include instructions about the statutory legal rights of workers under whistleblower statutes enacted by Congress to protect workers from retaliation by unscrupulous employers when workers report unsafe job conditions to their employers or to the relevant federal agencies.

The New Jersey Work Environment Council (WEC) is a non-profit organization of 60 labor, community and environmental organizations. WEC works for safe and healthy workplace environments. Such environments cannot be attained or maintained unless workers feel free to bring to the attention of their respective managements or to the relevant governmental agency, job safety concerns without fear of employer retaliation.

Both PHILAPOSH and WEC support Shannon Doyle's petition for a Writ of Certiorari because the opinion of the Third Circuit Court of Appeals would allow employers

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[1] The parties have consented to the filing of this brief under S.Ct. Rule 37.2 and the Letters of Consent have been lodged with the Clerk of the Court. Pursuant to S.Ct. Rule 37.6, Amici state that counsel for a party did not author the brief in whole or in part and that no one other than Amici, their members or their counsel have made any monetary contribution to the preparation or submission of this Brief.

to intimidate workers into a belief that workers will not have whistleblower protection if they were to report job safety concerns to their respective employers or to relevant federal agencies. Such beliefs adversely affect safety and health conditions in the workplace and in the areas outside the workplace.

II. STATEMENT OF THE CASE[2]

Petitioner Shannon Doyle, a resident of Alabama and an experienced nuclear radiation decontamination technician, was notified to report for work at the D.C. Cook nuclear energy facility in Bridgeman, Michigan in November 1988 (A51-56, 66)[3]. On arrival at the D.C. Cook facility Doyle was asked by his employer, Hydro Nuclear Systems (HNS), a subsidiary of Westinghouse (A-51), to complete several questionnaires and to endorse an "Authorization for Release of Information and Records" (A45). Doyle completed the questionnaires but objected to signing the HNS liability "release" provision which read as follows:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of furnishing or receiving such information pursuant to this authorization.

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[2] Amici adopt and supplement the Petitioner's Statement of the Case.

[3] References are to the Appendix attached to Petitioner's Brief for a Writ of Certiorari.

> Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation [sic] my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations. (A-45)

Doyle's objection to signing the HNS release was based on his belief that it would eliminate his whistleblower rights under the Energy Reorganization Act (ERA), 42 USC § 5851. The ERA reads as follows:

> No employer may discharge any employee or otherwise discriminate against any employee... because the employee...notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 USC § 2011 et seq.).

Doyle, therefore, requested HNS to amend its release to make clear that his endorsement would not cause him to lose his whistleblower rights (A55). HNS refused to clarify the release provision, Doyle refused to sign the release (A55) and HNS terminated Doyle's employment (A55). Thereafter in December 1988, Doyle filed an ERA complaint with the Department of Labor alleging that HNS' refusal to employ him was a violation of the ERA statute (A30).

Six (6) years later, in 1994, the Secretary of Labor published his Final Decision and Order on Doyle's complaint (A29 - A37) in which the Secretary decided that HNS had indeed violated the ERA and he therefore ordered HNS to offer employment to Doyle and to reimburse him for lost income (A35).

The following year, in 1995, the Nuclear Regulatory Commission (NRC), in its oversight capacity, issued a Notice of Violation to HNS for refusing to employ Doyle in 1988 (A60, A61) and six months later, in December, 1995, the NRC informed HNS that its release should be modified to make clear to employees and job applicants that endorsement of the HNS release does not affect their ERA rights. The NRC told HNS that such a modification was necessary because otherwise workers:

> [might] be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination.

Exhibit A.[4]

Another seven (7) years later, in March 2002, 14 years after Doyle had first filed his ERA complaint, the Court of Appeals for the Third Circuit, in a split decision, overruled the Secretary's decision and dismissed Doyle's complaint (A21). The Third Circuit denied Doyle's request for a rehearing. (A27, A28). Doyle has now filed a Petition for a Writ of Certiorari for Supreme Court review of the Third Circuit opinion.

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[4] The NRC letter to HNS of December 26, 1995 is designated as Exhibit A of this Brief. It was included in the record of *Doyle v. Secretary of Labor*, No. 00-1589 and *Doyle v. Hydro Nuclear Services, Inc. v. Secretary of Labor*, No. 00-2035 (3d Cir. 2001). The letter was Addendum 14 of Doyle's Brief in those actions.

III. SUMMARY OF ARGUMENT

The Supreme Court should grant Mr. Doyle's Petition for Certiorari because the split decision of the Court of Appeals, if allowed to stand, will allow unscrupulous employers to intimidate their workers and thereby make them believe that they must waive their statutory whistleblower rights in order to obtain and maintain employment and if they do endorse the release they will be reluctant to report safety and health conditions on the job to HNS or to the NRC.

A workplace where workers and management are not cooperating to prevent injuries and fatalities is also a workplace that adversely affects the health and safety of the general public. And this situation is of particular significance for facilities in the nuclear industry in the post September 11, 2001 period.

The HNS release is designed to intimidate HNS workers. That was the view of Doyle, the Secretary of Labor, the Nuclear Regulatory Commission and the dissenting member of the Court panel which decided Doyle's case. The effect of the Court's opinion is to endanger the health and safety of these workers and the general public beyond the facility. It is particularly dangerous because of the possibility of terrorist activities at our nations' nuclear facilities.

The Supreme Court should grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit.

IV. ARGUMENT

-1-

Doyle's complaint, whether analyzed as a matter of statutory construction, as the Secretary of Labor did (A34), or as a matter of contract law as the Court did (A17, fn. 14), must be decided on the effect of the HNS release in relation to the intent of the whistleblower statute. 42 USC § 5851. The statute reads, in relevant part, as follows:

> No employer may discharge any employee or otherwise discriminate against any employee... because the employee... notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954...

By considering Doyle's complaint to be a matter of contract law, the Court circumvented the need to defer to the Secretary's decision unless that decision was arbitrary or capricious or an abuse of discretion.

- 2 -

The Court ruled that the HNS release did not affect Doyle's whistleblower rights and that the release was unambiguous. (A17, fn. 14). To reach these conclusions the Court had to disregard Doyle's interpretation of the release (A51-A56); the Secretary's interpretation (A29-A35); the interpretation of the Nuclear Regulatory Commission (NRC) (A57-61); the NRC's instructions to HNS to modify the release (Exhibit A), and the Court had to disregard the opinion of its own dissenting Judge who wrote:

> I would reject this release not just as a violation of Mr. Doyle's ERA Rights, but as a violation of all employees' rights. (Emphasis added)

(A23)

How, in the light of all these contrary opinions, the Court could declare that the HNS release was not ambiguous the court did not reveal. Very recently the Third Circuit, in *Lawson v. Fortis Insurance Company*, #01-3316, Sl. Op. p. 13 (3rd Cir. August 22, 2002) set forth a common sense test for determining whether an insurance policy provision was ambiguous. This common sense rule holds that if there are significantly different interpretations of the meaning of a provision it should be deemed to be ambiguous. Applied to the Doyle case this common sense rule would require the Court to find the HNS release to be ambiguous though, perhaps, leaning in the direction of the Secretary's interpretation.

- 3 -

Though the Court's judgment was based on its finding that the HNS release was unambiguous it, nevertheless, put forth a fall-back position if the release was considered to be ambiguous. Under this view the Court declared that the ambiguous release should not be construed so as to make it illegal. The Court cited *Walsh v. Schlect*, 429 U.S. 401 (1977) in support of its argument but the Court's interpretation of *Walsh* was incorrect. The *Walsh* case concerned a labor-management contract provision related to the Davis-Bacon Act, 40 USC § 276(a), that established minimum pay rates. The Supreme Court found the contract provision to be ambiguous and then interpreted it so that it

served the intent of the Davis Bacon Act. Under that guide the Court said that the Davis-Bacon Act:

> was not enacted to benefit contractors, but rather to protect employees from substandard earnings.

429 U.S. at 411.

Had Doyle's Court followed the teachings of *Walsh v. Schlect* it would have been obliged to deem the HNS release to be a violation of the ERA because the ERA was not designed to benefit employers who use equivocal legal language to circumvent the ERA and thereby to intimidate their workers, but rather; the ERA's intent is to protect workers from employer retaliation and thereby to induce workers to report matters of health and safety to their employers and governmental agencies.

- 4 -

The Court accepted the HNS interpretation that it required Doyle to sign the release in order to complete its employment investigation of Doyle (A17, A18). To accept HNS' alibi it is necessary to close one's eyes to the facts and to disregard all logic. It is uncontested that Doyle voiced no objection to HNS' investigation of his employment qualifications. When HNS requested a liability release from Doyle he agreed to give it so long as he could be assured that his endorsement would not affect his ERA rights (A54). If, as HNS contends, the release was not intended to coerce or intimidate and it was not intended to abrogate workers' ERA rights, HNS could have satisfied Doyle's 1988 request in 15 minutes or less. Seven years later, in 1995, HNS was still using the same release or a similar release and the NRC wrote

to HNS that the HNS release may cause an applicant for employment "to be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination," (Exhibit A). The NRC then supplied HNS with language to modify the HNS release which in relevant part read as follows:

> "This release neither waives the right to file a complaint and obtain a remedy . . . nor does it release anyone from liability for illegal, discriminatory or prohibited acts under the ERA . . . or other NRC regulations."

Exhibit A.

The Court did not question why HNS, a year after the Secretary's decision in the Doyle case, had not invested fifteen (15) minutes to modify its release provision so as to ensure employees and job applicants that the release would not cause them to lose their ERA rights. Instead of fifteen (15) minutes HNS has been engaged in a fourteen (14) year campaign against Doyle to maintain the HNS release in the incomprehensible form they presented it to Doyle back in 1988.

- 5 -

The Court declared that even if the HNS release was a violation of the ERA it did not discriminate against Doyle because HNS had not singled him out and had not treated him less favorably than others similarly situated (A18). The ERA, however, is intended to prevent employer retaliation against any worker who reports job safety and health concerns to management or the NRC. Whether Doyle was treated the same as other employees is not the issue. The Court's

opinion suggests that if an employer retaliates against each and every worker who is so bold as to report job safety and health problems, the employer would not violate the ERA. Such an interpretation of the ERA is not believable; it is without question a violation of the ERA. The ERA protects each and every worker from employer retaliation whether or not the employer is also in violation of other employment law related to discrimination. Indeed the Secretary recognized that the HNS release was an illegal threat to all workers (A33).

The NRC uses the term "discrimination" to mean "firing, reduction of pay, poor performance appraisals and reassignment to a lower position or job (if it can be established that these actions were taken by the [employer] because a worker raised safety concerns." (NUREG/BR-0240 Rev.1). NRC's interpretation of "discrimination" in the ERA is clearly different from that of the Court's.

- 6 -

The Court declared that Doyle and other workers are obliged to sign the HNS release because if the release is deemed to be illegal it would not be enforceable. Thus the release could not have any adverse effect on Doyle's ERA rights (A16). This is truly a Heads I Win-Tails You Lose situation.

The Court's judgment that HNS had not violated the ERA when it refused employment to Doyle required the Court to employ some arcane legal theories, which most lawyers might find difficult to follow. Yet the Court would expect workers to appreciate these legal theories when applying for employment with HNS or other establishments that require endorsement of similar liability releases. It is doubtful that in

enacting the ERA or similar whistleblower protective statutes Congress expected workers would need the assistance of attorneys or retired Judges to obtain employment.

- 7 -

Congress has assigned the Secretary of Labor to be the administrator of the ERA and at least eleven other whistleblower statutes.[5] The Secretary, thereby, is the most knowledgeable and experienced government representative in respect to whistleblower law enforcement. The Court's circumvention of the Secretary's decision on the complaint of Mr. Doyle opens the way for other Courts of Appeals to

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[5] Laws with whistleblower protections administered by the Secretary of Labor.

- The Occupational Safety & Health Act of 1970 29 USC § 660.
- The Surface Transportation Assistance Act 49 USC § 20109.
- The Asbestos Hazard Emergency Response Act 20 USC §§ 3608, 4018.
- The International Safety Container Act 46 USC § Appx 1506.
- The Energy Reorganization Act (Nuclear Power Plants) 42 USC § 5851.
- The Clean Air Act 42 USC § 7622.
- The Safe Drinking Water Act 42 USC § 300j-9
- The Federal Water Pollution Control Act 33 USC § 1367.
- The Toxic Substances Control Act 15 USC § 2622.
- The Solid Waste Disposal Act 42 USC § 6971.
- The Comprehensive Environmental Response, Compensation and Liability Act 42 USC § 9610
- The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century 49 USC § 42121.

review the Secretary's decision on a de novo basis, without need to defer to the Secretary's decision. Unless the Supreme Court limits this type of circumvention it can be expected that similar cases will produce conflicting rulings in the various appellate districts and jeopardize the value of the extensive whistleblower experience that the Secretary has accumulated over the years.

On the basis of his whistleblower enforcement experience the Secretary ruled that HNS had violated the ERA (A35) and the NRC agreed with the Secretary. The NRC found that HNS' denial of employment to Doyle could be intimidating and coercive and that HNS' refusal to employ Doyle violated the ERA. See (A57, A61) and Exhibit A.

The Secretary's decision was not arbitrary or capricious or an abuse of discretion. The Court should have deferred to the Secretary's decision.

V. THE JUDGEMENT OF THE COURT OF APPEALS THREATENS HEALTH AND SAFETY OF ALL AMERICANS

That worker/management cooperation is absolutely necessary for preventing injury to workers and the general public is revealed by recently published statistics. In the most recent year for which data is available, the year 2000, the Bureau of Labor Statistics reported that there were 5,915 occupational fatalities[6] and over 110,000,000 occupational injuries, more than 6 for every 100 workers.[7]

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[6] http://www.bls.gov.iif.oshwc.cfoi.cftb141.txt

[7] http://www.bls.gov/iif/oshwc/osh/os/osnr0013.txt

Many of these fatalities and injuries may not have been prevented; but the Secretary of Labor and the Nuclear Regulatory Commission recognize that worker/management cooperation provides the best opportunity to undertake preventive action to reduce injuries and fatalities. When management, such as HNS, creates a coercive intimidating atmosphere it is far less likely that their workers will bring job problems and potential problems to the attention of management and therefore it is far more likely that injuries and fatalities will occur. HNS' refusal to make a simple modification to its release provision could not engender the worker/management cooperation needed for making a safer industrial environments.

The activities of workers in their places of work also affect the safety and health of the general public. We are all familiar with the great tragedy of Bhopal where in 1984 far more people outside the Union Carbide plant died and were permanently injured from the release of methyl isocyanate than in the 9/11 terroristic attack on the World Trade Center.[8]

And we all know of the meltdown of the nuclear energy plant in Chernobyl in 1986 where the people around the plant were exposed to radioactivity 100 times greater than the radiation exposure from the Hiroshima A-Bomb.[9]

And we should remember the Three Mile Island (Pennsylvania) nuclear accident in 1979 when there was a radiation leak from a partial meltdown and all pregnant

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[8] http://www.bhopal.com/review.htm

[9] http://www.chernobyl.com/info.htm

women and preschool children living within five (5) miles of the facility were evacuated.[10]

We recall the spill of the Exxon Valdez in 1989 when eleven (11) million gallons of crude oil spilled into Prince William Sound, with disastrous effect to the environment, to the food chain, to the birds and wildlife of that once pristine area.

And we also are aware of rail and truck spills of hazardous materials which not only affect the safety and health of railroad employees and truck drivers but also affect the health and safety of the surrounding public and causes them to be evacuated.

The need for work/management cooperation to protect nuclear plant workers is particularly important in the aftermath of the terrorist attacks of September 11, 2001 because the affects of a terrorist attack on a nuclear facility would be so catastrophic. Therefore workers should be encouraged to report job conditions which may affect the continuous safe operation of nuclear plants so that management and the NRC have an early opportunity to immediately investigate and undertake any necessary remedial action. Such worker/management cooperation is not encouraged by managements who insist on enforcement of HNS type liability releases.

The need for worker/management cooperation in the nuclear industry was recognized by the Secretary of Labor in *Hill v. T.V.R.* 87 ERA 23, 24 (1989):

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[10] http://www.acsh.org/publications/reports/island_0399.html

> In the nuclear power industry, given the magnitude of the potential hazards to employees and public safety and health, there is an especially compelling need to keep open the channels of communication regarding potential safety and health violations.

What was true in 1989 is even more true today. The dissenting Judge in the Doyle case also recognized the disastrous effects that can result when nuclear plant workers are concerned about both job safety and job employment. Here is how he ended his dissenting opinion:

> We have upheld an employer's ability to make its employees uncertain about the status of their whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

(A24).

The health and safety of our nation in significant measure depends on the safe operation of our industrial workplaces. The ERA was enacted to provide workers the right to participate with management in attaining and maintaining safe workplaces. The Court of Appeals, however, would enable managements to intimidate workers so that they refrain from bringing safety or health problems to management or the NRC, precisely the situation that the ERA is intended to overcome. The Court of Appeals, thereby has endangered the safety and health of the workers and the safety and health of the public.

VI. CONCLUSION

Oliver Wendell Holmes, Associate Justice of the U.S. Supreme Court from 1902 to 1932, in his lectures on the Common Law, offered the following advice:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

The Common Law, Oliver Wendell Holmes, 1881.

Had the Court of Appeals for the Third Circuit been guided by Holmes' wisdom they would not, in the year 2002, have reversed the decision of the Secretary of Labor of 1994. The U.S. Supreme Court should grant Mr. Doyle's petition for a Writ of Certiorari so that it can reverse the opinion of the Third Circuit and thereby protect the rights of Mr. Doyle and the safety and health of all Americans.

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
BY: JEROME BALTER

Counsel for Amici Curiae
PHILAPOSH and W.E.C.

BEST AVAILABLE COPY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 26, 1995

Patricia Stafiej, President
Westinghouse Staffing Services
P.O. Box 158
Madison, Pennsylvania 15663-0158

Dear Ms. Stafiej,

This is to acknowledge receipt of your September 16, 1995 letter concerning the Notice of Violation (Notice) issued by the Nuclear Regulatory Commission on June 18, 1995 to Hydro Nuclear Services. The Notice was issued in the matter of Shannon Doyle v. Hydro Nuclear Services, DOL Case Number 89-ERA-022.

I note that Westinghouse denies the violation and that Westinghouse has appealed the Secretary of Labor decision in the case to the Third Circuit Court of Appeals. The NRC will monitor the Third Circuit proceeding and, if the Secretary of Labor's decision is overturned, the NRC will reevaluate its enforcement action.

With respect to Westinghouse's Access Authorization Programs Questionnaire, the NRC notes that the Secretary of Labor said that a "waiver of rights under the [Energy Reorganization Act] could not be raised by Respondent as a defense" (Secretary of Labor's Final Decision and Order, March 30, 1994, at 6). However, the applicant for employment may be swayed by his or her signing of such a waiver and discouraged from filing a claim of discrimination, thinking that the waiver prevented such a claim. You indicated in your letter that the release language in question was and is not intended to preclude an employee or prospective employee from bringing a claim of discrimination. To make that clear to employees and prospective employees who are required to sign the release, the NRC recommends that the Westinghouse Access Authorization Programs Questionnaire be amended to insert a sentence, after the phrase "information released in good faith" as follows:

> "This release neither waives the right to file a complaint and obtain a remedy pursuant to the protection provided by Section 211 of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. Section 5851, as amended, nor does it release anyone from liability for illegal, discriminatory or prohibited acts under the ERA, the Atomic Energy Act, 10 CFR 50.7, or other NRC regulation."

If you have any questions on this matter, you may contact me at (301) 415-2741.

Sincerely,

James Lieberman, Director
Office of Enforcement

EXHIBIT A

ADDENDUM

Received Time Aug.12. 10:08AM

AFFIDAVIT

Commonwealth of Pennsylvania

County of Philadelphia

Jerome Balter, being of age and duly sworn according to the law, deposes and says he is an attorney employed by the Public Interest Law Center of Philadelphia and that he represents the Philadelphia Area Project On safety and Health (PHILAPOSH) and the New Jersey Workers Environment Council (WEC); who are submitting an Amici Curiae Brief in behalf of Shannon T. Doyle's petition for a Writ of Certiorari.

The Amici Curiae brief includes Exhibit A, which is a letter of the Nuclear Regulatory Commission (NRC) to Westinghouse Staffing Services (successor to Hydro Nuclear Services). The NRC letter is dated December 26, 1995. The letter was not included in the appendix of the petition Mr. Balter discovered the letter in a Brief dated May 1, 2001 submitted by Doyle in Doyle v. Hydro Nuclear Services #00-1589 and #00-2835. The Nuclear Regulatory Commission letter of 12/26/95 was included as "Addendum #14" of that Brief.

Jerome Balter

Sworn to and Subscribed
before me this 20 day
of September, 2002

Cynthia A Warfield

NOTARY PUBLIC

NOTARIAL SEAL
CYNTHIA A. WARFIELD, Notary Public
City of Philadelphia, Phila. County
My Commission Expires May 5, 2002

Sep.23. 2002 2:15PM NO.9284 P.4

FILED
OCT 30 2002

No. 02-297

In the Supreme Court of the United States

SHANNON T. DOYLE, PETITIONER

v.

HYDRO NUCLEAR SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a job applicant did not engage in protected activity under Section 210(a)(3) of the Energy Reorganization Act of 1974, Pub. L. No. 95-601, § 10, 92 Stat. 2951 (42 U.S.C. 5851), by refusing to sign, as a condition of employment, a pre-employment waiver of liability form that he erroneously believed would require him to waive his statutory right to pursue future claims under Section 210 for illegal blacklisting.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 285 F.3d 243. The decisions of the Secretary of Labor (Pet. App. A29-A37) and the administrative law judge (Pet. App. A38-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2002. A petition for rehearing was denied on May 30, 2002 (Pet. App. A26-A28). The petition for a writ of certiorari was filed on August 26, 2002. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 210(a) of the Energy Reorganization Act of 1974 (ERA), added by Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10, 92 Stat. 2951 (codified at 42 U.S.C. 5851(a) (1988)), provides:

> (a) No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this [Act] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this [Act] or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any

other action to carry out the purposes of this [Act] or the Atomic Energy Act of 1954, as amended.[1]

STATEMENT

1. Section 210 of the Energy Reorganization Act of 1974 (ERA) prohibits employers from discharging or otherwise discriminating against nuclear industry whistleblowers, *i.e.*, employees who engage in specified forms of protected conduct relating to the advancement of nuclear safety. 42 U.S.C. 5851(a) (1988). It thus "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." *English* v. *General Elec. Co.*, 496 U.S. 72, 82 (1990).

Although most nuclear safety responsibilities are assigned by law to the Nuclear Regulatory Commission, "enforcement and implementation of [Section] 210 was entrusted by Congress * * * to the Department of Labor." *English*, 496 U.S. at 83 n.6. An employee who believes that he has been illegally discharged or otherwise discriminated against may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1) (1988). The Department of Labor must investigate the allegation and notify the complainant and respondent of its initial determination as to whether a violation has occurred. 42 U.S.C. 5851(b)(2)(A) (1988). A party dissatisfied with that determination may request a hearing before an administrative law judge (ALJ). 42 U.S.C. 5851(b)(2)(A) (1988). After the hearing, an ALJ issues a recommended decision and forwards it with the record

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[1] Section 210 was amended and renumbered Section 211. Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902, 106 Stat. 3123 (codified at 42 U.S.C. 5851). Section 210 applies to this case because the complaint was filed in 1988. Pet. App. A2.

to the Secretary, who issues a final order. 29 C.F.R. 24.6(a) and (b) (1997).[2] Any person adversely affected or aggrieved by the Secretary's final order may obtain judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1) (1988).

2. In the fall of 1988, respondent Hydro Nuclear Services (Hydro), a company that provided workers to nuclear power plants, recruited petitioner for a short-term position at a plant in Michigan. Pet. App. A3-A4. After petitioner completed pre-employment training and testing, Hydro asked petitioner to sign an "Authorization for Release of Information and Records" allowing Hydro to obtain materials such as employment, military, educational and criminal records from various sources, including previous employers. *Id.* at A4-A5, A40-A41, A52.

Petitioner objected to a single paragraph of the release, which provided:

> I hereby release and discharge [Hydro], their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Pet. App. A5. Petitioner signed and returned the release, but only after crossing out the above paragraph.

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[2] After the Secretary's decision on liability in this case, the Department of Labor's Administrative Review Board (ARB) was delegated authority to make final agency decisions for the Secretary. 29 C.F.R. 24.7 and 24.8; 61 Fed. Reg. 19,978 (1996), superseded by 67 Fed. Reg. 64,272 (2002).

Ibid. Petitioner explained to Hydro's Manager of Employee Relations that he had filed a whistleblower complaint against a former employer, and he believed the paragraph would waive his right to file a blacklisting complaint under the ERA based on information that Hydro might receive from his former employer. *Id.* at A5, A41- A42, A54. Hydro refused to hire petitioner because he declined to sign the full release. *Id.* at A5-A6, A41-A42, A54-A55.

3. Petitioner filed a complaint with the Department of Labor, alleging that Hydro violated Section 210 of the ERA by refusing to hire him unless he signed the release. Pet. App. A6, A51-A56. The Department's Wage and Hour Division rejected the claim on the ground that petitioner's refusal to sign the release was not protected activity. *Id.* at A6. After a hearing, the ALJ issued a recommended decision also holding that petitioner had not engaged in protected activity by refusing to sign the unaltered release. *Id.* at A40-A44.

The Secretary rejected the ALJ's recommended decision, holding that Hydro violated the ERA. Pet. App. A29-A37. The Secretary disagreed with "the ALJ's interpretation of the authorization form," *id.* at A31, because, in the Secretary's view, "by signing the form, [petitioner] would have waived his right to file a complaint of illegal blacklisting under the ERA." *Id.* at A31-A32. The Secretary noted that petitioner "is a layman who was not represented by counsel when the dispute over the authorization form took place," and reasoned that the provision "could easily be interpreted as a waiver of his rights under the ERA." *Id.* at A36 n.1. The Secretary concluded that, even though the release was probably unenforceable, a requirement that prospective employees sign such a release violates the ERA because employees who signed the release "may

reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems." *Id.* at A34.

The Secretary also rejected Hydro's contention that "use of the authorization form in Complainant's case was not a pretext because [Hydro] routinely uses the form for screening all applicants." Pet. App. A36 n.5. The Secretary explained that the issue "is not whether use of the form was a pretext for discrimination for some other impermissible reason. [Hydro's] reason for not hiring Complainant is clear. The only issue is whether that reason is itself a violation of the ERA." *Id.* at A36-A37 n.5. The Secretary concluded that Hydro violated the ERA when it refused to hire [petitioner] because he refused to sign the authorization form unless the release of liability paragraph was deleted." *Id.* at A35.

4. A divided panel of the court of appeals reversed. Pet. App. A1-A25. The panel majority held that petitioner "did not engage in protected activity when he refused to sign the employment application with the release," and therefore petitioner did not establish the first element of a prima facie case of illegal retaliation. *Id.* at A15. The court interpreted the release to not waive claims for illegal blacklisting, but rather as releasing claims only as a "result[] of furnishing or receiving such information pursuant to this authorization." *Id.* at A15 (quoting release).

The court of appeals also reversed the Secretary's decision for a "second, independent reason," holding that petitioner failed to demonstrate that Hydro's "proffered legitimate reasons for refusing to hire him without * * * the release—namely, to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened

temporary employees—were pretextual, as required to impose liability." Pet. App. A17 (footnote omitted). The court reasoned that "the record makes clear that Hydro furnished the authorization to all applicants for temporary positions" and that there was no "evidence to suggest that Hydro treated [petitioner] less favorably because of his exercise of rights purportedly protected under the ERA." *Id.* at A18.

Judge Bright dissented. Pet. App. A22-A25. In his view, the release is facially ambiguous and "can be read to release former employers as well as putative employers from liability" for ERA claims. *Id.* at A22. Judge Bright thus would have upheld the Secretary's decision so that nuclear power employees would not be "compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment." *Ibid.*

ARGUMENT

Petitioner challenges the court of appeals' determination (Pet. App. A15-A17) that petitioner was not engaging in protected activity in refusing to sign Hydro's pre-employment release. That contention does not warrant further review by this Court.

1. Petitioner argues (Pet. 14-16, 20-21) that this Court's review is warranted because the court of appeals improperly upheld the legality of a prospective waiver of substantive employment rights. That is not correct. The court of appeals explicitly held that the waiver at issue did *not* encompass prospective blacklisting or other substantive ERA whistleblower claims. *Id.* at A16-A17 & n.14. Thus, in the court's view,

> [t]he release simply did not purport to waive liability for Hydro's employment decisions or other claims [petitioner] might make under the ERA after

> Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Id. at A16. The court of appeals' fact-bound view of Hydro's pre-employment form—even if erroneous—does not warrant this Court's review.

2. Petitioner further argues (Pet. 16-19) that the court of appeals erred in focusing on an objective test of whether a release is enforceable and in disregarding an applicant's reasonable construction of the release. Again, that contention misconceives the court of appeals' decision, which found the release *unambiguous* in not purporting to waive substantive employment claims, including blacklisting based on whistleblowing activity. Pet. App. A17 n.14. Given that factual premise, the court of appeals had no occasion to address whether a refusal to sign an ambiguous release that is reasonably understood by the applicant to waive substantive whistleblower rights is protected activity under the ERA.[3]

Petitioner therefore errs in arguing (Pet. 16-20) that the decision below conflicts with the reasoning of *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975). That decision construed the anti-retaliation provision of the Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), on quite different facts as protecting

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[3] The Secretary's decision did address that question because it considered the release to be ambiguous. Given that premise, the Secretary held that Section 210 protects an employee who refuses to sign a release based on a reasonable, good faith belief that the release would waive the employee's rights under the ERA. Pet. App. A30-A31, A33-A34; accord 10 C.F.R. 50.7(f) (NRC regulation prohibiting waivers of ERA rights). Because that question of statutory interpretation was not addressed by the court of appeals, however, there is no occasion for this Court to review the issue.

an employee who protested based on a "*reasonable* belief" that her employer was unlawfully requiring employees to endorse and return to the company back pay checks it had issued to employees at the direction of the Department of Labor. 513 F.2d at 181 (emphasis added). By contrast, the court of appeals did not find in this case that petitioner reasonably construed the release to waive blacklisting claims; indeed, the court of appeals found the release to be unambiguous in not waiving such claims. Pet. App. A17 n.14.[4]

3. Petitioner also asserts (Pet. 24-26) that the decision below conflicts with other court of appeals' decisions that give deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Secretary's decisions construing the scope of protected activity under the ERA. The court of appeals based its decision, however, on its interpretation of the contractual provision at issue, Pet. App. A16, and accordingly saw "no reason to defer to the Secretary on this issue of law involving the construction of a proposed contract rather than construction of a statute." *Id.* at A17 n.14. Indeed, the court's opinion specifically observed that it was required to "pay deference to the Secretary in construing the statutes he is charged with administering." *Id.* at A10 (citing *Chevron, supra*).

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[4] The other two decisions relied upon by petitioner (Pet. 21-24) also do not conflict with the decision below. In *Connecticut Light & Power Co.* v. *Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), the court held that a settlement offer with a facially illegal gag order violated the ERA, and in *Secretary of Labor* v. *Mullins*, 888 F.2d 1448, 1449 n.1 (D.C. Cir. 1989), there was no dispute that the employer violated the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), by discharging the employee for engaging in a protected work refusal.

4. In any event, this Court's resolution of the contentions raised by petitioner would not afford him relief As an "independent" basis for its decision, the court of appeals found that Hydro had a legitimate non-discriminatory reason for refusing to hire petitioner. Pet. App. A17. Petitioner does not challenge that conclusion as worthy of this Court's attention. Pet. i. Especially in those circumstances, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-297

In the Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT HYDRO NUCLEAR SERVICES, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a standard authorization form allowing a prospective employer to gather background information regarding prospective employees, as part of a security screening process for all potential employees seeking unescorted access to a nuclear power plant, did not waive employees' rights under the whistleblower protection provisions in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851.

2. Whether the court of appeals correctly held (a) that an employer cannot be liable under the ERA in the absence of any evidence of the employer's discriminatory intent; (b) that the Secretary of Labor entirely failed to address the discriminatory intent issue; and (c) that petitioner failed to carry his evidentiary burden in that regard.

PARTIES TO THE PROCEEDING

1. Respondent Hydro Nuclear Services, Inc. ("Hydro") was a petitioner in the court below.

2. Petitioner Shannon T. Doyle was the complainant in the proceedings before the Department of Labor and a petitioner in the court below.

3. The United States Department of Labor, the Secretary of Labor, and the Department of Labor Administrative Review Board, were respondents to the petitions for review filed by Hydro and Mr. Doyle below.

CORPORATE DISCLOSURE STATEMENT

Respondent Hydro Nuclear Services, Inc. ("Hydro") no longer exists as a separate entity. In the late 1980s, Hydro became part of Westinghouse Radiological Services, Inc. ("Radiological Services"), a wholly owned subsidiary of Westinghouse Electric Corporation ("WELCO"). On March 8, 1990, Radiological Services changed its name to Westinghouse Staffing Services, Inc. ("Staffing Services"). On December 1, 1997, WELCO changed its name to CBS Corporation ("CBS").

On March 22, 1999, CBS transferred its ownership of Staffing Services to Westinghouse Electric Company LLC ("WEC"). WEC is a wholly owned subsidiary of British Nuclear Fuels plc. Neither British Nuclear Fuels plc nor WEC is a publicly traded company. Staffing Services itself was dissolved on July 12, 1999.

WEC posted a $1.25 million bond on Hydro's behalf in the United States District Court for the Western District of Pennsylvania, and thus WEC has a financial interest in the outcome of this litigation. WEC posted the bond as a condition of that court's stay of Mr. Doyle's action to enforce the monetary award at issue in this case.

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In the Supreme Court of the United States

No. 02-297

SHANNON T. DOYLE,
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HYDRO NUCLEAR SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT HYDRO NUCLEAR SERVICES, INC. IN OPPOSITION

Respondent Hydro Nuclear Services, Inc. ("Hydro") submits this brief in response to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 285 F.3d 243. The final decision of the Administrative Review Board on damages is unreported, but can be found at 2000 DOL Ad. Rev. Bd. LEXIS 49. The final decision of the Secretary of Labor as to liability (Pet. App. A29-A35) is unreported, but can be found at 1994 WL 897315 (DOL Off. Adm. App.). The decision of the Department of Labor Administrative Law Judge granting Hydro's motion for summary judgment (Pet. App. A38-A44) is unreported. These and other opinions and orders in this case

are available in the Whistleblower Collection of the Department of Labor Office of Administrative Law Judges online Law Library, at http://www.oalj.dol.gov/public /wblower/ refrnc/eralist2.htm (docket no. 89-ERA-22).

STATEMENT OF THE CASE

A. Authorization for Unescorted Access to Nuclear Power Plants

This case arises from Hydro's decision not to hire Mr. Doyle for a six-week temporary employee position because he refused to sign a standard form allowing Hydro to conduct a background investigation prior to granting him unescorted access to the D. C. Cook nuclear power plant in Bridgman, Michigan. At the time it attempted to hire Mr. Doyle, Hydro was in the business of providing temporary workers to assist in the decontamination and maintenance of nuclear power plants. Pet. App. A3. As a contractor serving entities licensed to operate nuclear plants, Hydro bore a substantial responsibility for safeguarding public health and safety by ensuring that its temporary workers satisfied the security requirements for access to the nuclear plants to which Hydro sent them. Pet. App. A44.

Given the serious public safety and security issues associated with clearing persons for unescorted access to nuclear power plants, Hydro developed standard screening procedures in accordance with statutory and regulatory guidelines. These "access authorization" procedures are designed to control access to the protected areas of nuclear facilities. Seeking to develop a uniform set of standards, in 1984, the Nuclear Regulatory Commission ("NRC") issued a proposed rule to formalize access authorization programs.[1] On March

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[1] Access Authorization Program, 49 Fed. Reg. 30726 (Aug. 1, 1984). Congress delegated to the NRC broad authority to regulate the operation of nuclear power plants. *See, e.g.*, 42 U.S.C. § 2201; 42 U.S.C. § 5841(f).

9, 1988, the NRC issued a policy statement setting forth industry-proposed guidelines, which sought "to ensure that individuals who require unescorted access to protected areas or vital areas of [nuclear] facilities are trustworthy, reliable, emotionally stable, and do not pose a threat to commit radiological sabotage."[2] The guidelines provided for background checks and psychological evaluations. 53 Fed. Reg. 7536.

Accordingly, Hydro's standard screening procedures required applicants to undergo a drug test, a psychological evaluation, a physical examination, and a thorough investigation of their prior employment, their medical and educational background, and their military and criminal records, if any. These requirements were consistent with the guidelines set forth in the NRC's Policy Statement (now codified as an NRC regulation), which require a background investigation sufficient to establish "an individual's true identity, and [to] develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and [to] verify an individual's character and reputation." 10 C.F.R. § 73.56(b)(2)(i); 53 Fed. Reg. 7538-39.

To facilitate its background investigations of those requiring unescorted access, Hydro required all applicants to sign a form entitled "Authorization for Release of Information and Records." Pet. App. A4, A18. The authorization allowed a wide variety of entities—including federal, state, and local government agencies, schools, doctors, hospitals, credit organizations, criminal justice agencies, and former employ-

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Establishing safety standards is a primary mandate within that delegation of power. *See, e.g.*, 42 U.S.C. § 2133(b).

[2] Nuclear Power Plant Access Authorization Program; Policy Statement, 53 Fed. Reg. 7534, 7534-35 (March 9, 1988). On April 25, 1991, the NRC promulgated a final rule at 10 C.F.R. § 73.56 (1991) based on the guidelines contained in the Policy Statement.

ers—to provide information about the applicants to Hydro, which then used that information to evaluate the applicants' "eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations."[3] Pet. App. A45.

The form released Hydro and the entities providing information from liability for "furnishing or receiving" information pursuant to the authorization.[4] Pet. App. A4-A5, A15, A45. It did not suggest that the applicant released Hydro or anyone else from liability under the whistleblower provisions of the Energy Reorganization Act ("ERA").

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[3] Mr. Doyle's petition asserts that Hydro failed to demonstrate that "it ever proffered a similar prospective waiver to other employment candidates." Pet. 6 n.4. But Mr. Doyle has never argued or presented evidence that the release was somehow special to him. As the court of appeals correctly observed, Mr. Doyle never claimed that Hydro treated him differently from other applicants. Pet. App. A4. The court of appeals further commented that "the record makes clear that Hydro furnished the authorization to all applicants for temporary positions," and the Secretary took no issue with the proposition that Hydro "routinely uses the form for screening all applicants." Pet. App. A18, A36; *see also* Pet. App. A43 (Recommended Decision and Order of the Administrative Law Judge referring to the "standard release form"). Mr. Doyle does not seek review of the determination that the form he was asked to sign was a standard authorization and release form presented to all potential employees.

[4] The Authorization for Release of Information and Records, which is reprinted in full in the appendix to the petition, provided in part as follows:

> Further, I hereby release and discharge Hydro Nuclear Services, their [*sic*] representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [*sic*] of furnishing or receiving such information pursuant to this authorization.

Pet. App. A4-A5, A45.

Indeed, the form did not even mention the ERA.[5] Pet. App. A16; *see* Pet. App. A45. The authorization did contain an explicit reference to the Privacy Act, 5 U.S.C. § 552a, which is consistent with the form's limited purpose of waiving potential claims for privacy infringement. Pet. App. A4, A16, A45.

B. Mr. Doyle's Employment Application

In the fall of 1988, Hydro recruited Mr. Doyle to work as a temporary senior decontamination technician during a planned outage at the D. C. Cook nuclear power plant. Pet. App. A3-A4. Had he been hired, Mr. Doyle would have earned $6.50 per hour, plus a per diem allowance and extra pay for overtime, for the six-week period of the D.C. Cook outage. Pet. App. A4.

As part of its routine screening process, Hydro required Mr. Doyle to take a series of psychological and drug tests and to complete a routine employment application that included Hydro's standard release form. Despite the limited nature of the release, Mr. Doyle crossed out the second paragraph before signing it. Pet. App. A41. Upon learning that Mr. Doyle refused to sign the unaltered form, Hydro's Manager of Employee Relations, Robert Booker, explained to Mr. Doyle that Hydro needed a signed, unaltered release in order to perform the required background check. JA 191.[6] Mr. Booker further explained that all prospective employees were required to sign the form, which was an integral part of the

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[5] At the relevant time, the whistleblower protection provisions were contained in Section 210 of the Energy Reorganization Act of 1974, as amended. Pub. L. No. 95-601, § 210, 92 Stat. 2947, 2951 (1978). In 1992, Congress amended Section 210 and redesignated it as Section 211. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, §2902, 106 Stat. 2776, 3123 (1992). Section 211 is codified at 42 U.S.C. § 5851 (1994).

[6] "JA" refers to the parties' Joint Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

pre-employment screening process necessary to obtain security clearance for unescorted access to the plant, and that Mr. Doyle's refusal to sign the form would prevent Hydro from hiring him. *Id.* at 191-92.

Mr. Doyle then mentioned that he had been involved in a "whistleblower incident" with a previous employer. Pet. App. A42. This was the first that Mr. Booker had heard of this incident, and he did not question Mr. Doyle about its details. JA 192; Pet. App. A5. Mr. Booker explained that Hydro's only interest in requiring the signed release was to enable it to complete the background investigation so that Mr. Doyle could obtain security clearance for unescorted access to the plant. JA 191-92; Pet. App. A5; *see also* JA 183-84. Mr. Doyle refused to sign the release, and Hydro did not hire him. *Id.*[7]

Notwithstanding Mr. Doyle's refusal to sign its authorization form, Hydro paid him the $48.00 per diem for the entire 15 days that he spent in Michigan. Pet. App. A5-A6. Hydro also reimbursed Mr. Doyle for the cost of his travel between Michigan and his home in Alabama. *Id.*; Pet. App. A40, A42.

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[7] The petition asserts that Mr. Doyle also expressed a concern regarding potential "blacklisting" to Dan Haynes, another Hydro employee. *See* Pet. 4. The sole support cited for this claim is Mr. Doyle's initial complaint to the Wage and Hour Division. The complaint, however, does not support the statement in the petition that Mr. Doyle discussed "blacklisting" with Mr. Haynes. According to the complaint, Mr. Doyle merely stated that he would file a complaint with the Department of Labor if Hydro maintained that the initial results of Mr. Doyle's drug screen—which yielded a positive result—were accurate, even if his subsequent test was negative. Pet. App. A53. Mr. Doyle's complaint also alleges that he informed a Mr. McCormick of his "previous whistleblower status," in the context of discussing the drug tests. *Id.* That allegation also did not mention "blacklisting." In any event, Mr. Doyle does not even suggest that either of these conversations was relayed to Mr. Booker, the Hydro manager with whom Mr. Doyle discussed the authorization and release form at issue in this case.

C. Proceedings Before the Department of Labor

On December 9, 1988, Mr. Doyle filed a complaint with the Wage and Hour Division of the United States Department of Labor, alleging that Hydro violated the Energy Reorganization Act by refusing to hire him unless he signed Hydro's standard authorization form. Pet. App. A51-A56. Hydro filed a response to the complaint on January 26, 1989.[8]

The Wage and Hour Division determined that Mr. Doyle's complaint should be dismissed because "all evidence indicates that Hydro Nuclear Services, Inc. terminated [Mr. Doyle's] employment solely because of [his] refusal to sign the firm's standard Privacy Act waiver form and not because of [his] prior admitted whistleblower activities." Pet. App. A6; JA 186. Mr. Doyle requested a hearing before an Administrative Law Judge.

On cross motions for summary judgment, the ALJ held that Hydro did not violate the ERA by discontinuing consideration of Mr. Doyle's employment application when he refused to

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[8]Hydro's answer—in the form of a letter from Mr. Booker responding to the complaint letter from Mr. Doyle (JA 182-185)—was not included in the administrative record compiled by the Department of Labor because, although it was submitted to the Wage and Hour Division, it was not separately presented to the Administrative Law Judge. Instead, Hydro's written submission to the ALJ (JA 189-201) relied on and summarized the points made in the Booker letter. Because it is undisputed that the Booker letter was submitted to the Wage and Hour Division in January 1989, shortly after Mr. Doyle's complaint, Hydro moved in the court of appeals to supplement the administrative record by adding the Booker letter. Although petitioner now disparages the Booker letter as "self-serving and untested" (Pet. 6 n.4), it stands on the same footing as Mr. Doyle's complaint letter, on which the petition relies. *See* Pet. 4. Moreover, the substance of the Booker letter—including the routine nature of the authorization form—was set forth in Hydro's pre-hearing statement before the ALJ, which undeniably was part of the administrative record. After the court of appeals issued its decision in Hydro's favor, the court denied Hydro's motion to supplement the administrative record.

sign Hydro's standard authorization form.[9] In his Recommended Decision and Order, dated July 17, 1989, the ALJ explained that Mr. Doyle's refusal to sign the release was not protected by the ERA because signing the release would not have waived any rights under the statute. Pet. App. A44. The ALJ expressly agreed with Hydro's interpretation that "the release is extremely narrow and only applies to that which flows from the act of turning over records to the Respondent. It does not release anyone from any illegal acts under the ERA or Atomic Energy Act." Pet. App. A43 (quoting Hydro's countermotion for summary decision). The ALJ also concluded that it was not improper for Hydro to require applicants to release it and other entities from liability for turning over records:

> [Hydro] had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [*sic*] record. Since [Mr. Doyle] refused to accept this requirement I find that [Hydro] had a legal right to refuse to employ [Mr. Doyle]. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. [Hydro] in requiring all employees including [Mr. Doyle] to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.

Pet. App. A44. The ALJ's recommendation that the complaint be dismissed was forwarded to the Secretary of Labor for a final decision.

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[9] In his petition, Mr. Doyle inaccurately states that this case was decided on a "stipulated record." Pet. 7. Although the parties stipulated to certain facts before the ALJ (*see* Pet. App. A40-A42), there was never any agreement that these were the only facts relevant to this case. Indeed, Mr. Doyle does not limit his own statement of facts to those contained in the parties' stipulation. *See, e.g.*, Pet. 4 (citing Mr. Doyle's complaint to the Wage and Hour Division).

After nearly five years of inactivity, the Secretary summarily rejected the ALJ's analysis and recommendation, and held that Hydro violated the ERA by refusing to hire Mr. Doyle. Pet. App. A35. Although he concluded that the language of the Authorization for Release of Information and Records was ambiguous, and observed that "[e]ven lawyers can disagree over [its] scope and effect," the Secretary nonetheless construed the form to be a waiver of an applicant's ERA rights. Pet. App. A31-32, A36 n.1. At the same time, the Secretary recognized that any such waiver would be unenforceable as a matter of public policy. Pet. App. A33.

The Secretary did not address the issue whether Hydro's decision to discontinue consideration of Mr. Doyle's application was motivated by any discriminatory intent, and instead focused solely on what he considered to be the proper interpretation of the authorization form. Pet. App. A19 n.16. In doing so, the Secretary did not attempt to explain why he believed the ALJ's interpretation was incorrect. He did not take any evidence that might have put him in a better position than the ALJ to discern the meaning of the release. Instead, the Secretary merely proclaimed that "[g]iving the authorization form its most narrow reading, it would release Respondent and any other employer from whom Respondent obtained information about Complainant from any claim that the information had been provided or used to deny Complainant employment because of protected activities under the ERA." Pet. App. A31.

The Secretary apparently found it necessary to alter the phrasing of the release in order to reach his result. The document itself limits the release of liability to that which results from "*furnishing or receiving*" information. Pet. App. A45 (emphasis added). To conclude that the release applied to claims of illegal blacklisting, however, the Secretary characterized the release as extending to claims that the "information had been *provided or used*" to deny em-

ployment. Pet. App. A31 (emphasis added). Moreover, the Secretary's declaration that the "most narrow reading" of the form included a waiver of ERA rights is inconsistent with his own earlier statement that the language was ambiguous. *Compare* Pet. App. A36 n.1 *with* Pet. App. A31.

As a result of his decision, the Secretary ordered Hydro to reinstate Mr. Doyle with back pay, including interest. Pet. App. A35. After additional discovery and further proceedings on the issue of remedies (*see* Pet. App. A8-A9), the Administrative Review Board issued its Final Decision and Order on May 17, 2000.[10] The Administrative Review Board awarded Mr. Doyle more than $787,000 in back pay, front pay, lost benefits, compensatory damages, attorneys' fees, and costs. It also awarded prejudgment and postjudgment interest on the back pay and front pay awards. JA 155-56; Pet. App. A3, A9. With accrued interest, the total amount of Hydro's liability under the Secretary's now-vacated decision would exceed $1 million.

On May 18, 2000, Hydro petitioned the United States Court of Appeals for the Sixth Circuit for review of the Secretary's March 30, 1994 decision on liability and the ARB's May 17, 2000 Final Decision and Order awarding damages and entering judgment. Pet. App. A9. On May 19, 2000, Mr. Doyle petitioned the United States Court of Appeals for the Third Circuit for review of the ARB's damage award. The Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in the Third Circuit, and the Sixth Circuit transferred the Hydro petition to the Third Circuit, which then consolidated the two requests for review. *Id.*

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[10] In 1996, two years after the decision on liability in this case, the Secretary delegated the authority to make final decisions in ERA cases to the Administrative Review Board. *See* 61 Fed. Reg. 19978 (April 17, 1996).

In an intervening development that occurred after the Secretary's liability decision, the NRC issued a Notice of Violation to Hydro. *See* Pet. App. A57. The NRC's notice was based solely on the Secretary's ruling. *See* Pet. App. A57. The NRC did not conduct its own investigation, but simply relied on the Secretary's finding that the Authorization for Release of Information and Records effectively released any claim for illegal blacklisting. Pet. App. A58. Westinghouse Staffing Services (as Hydro's successor) denied the violation, and informed the NRC that the release in question was not intended to preclude employees from bringing claims under the ERA. In a letter dated December 26, 1995, the NRC acknowledged that WSS denied the violation and had appealed the Secretary's decision to the Third Circuit.[11] The NRC stated that it would "monitor the Third Circuit proceeding and, if the Secretary of Labor's decision is overturned, the NRC will reevaluate its enforcement action."[12]

D. The Court of Appeals' Decision

On March 27, 2002, the court of appeals granted Hydro's petition, set aside the Secretary's finding of liability, and vacated all awards of damages, remedies, fees, and costs. The court also dismissed Mr. Doyle's petition as moot. Pet. App. A3, A21-A22.

The court of appeals held that Mr. Doyle did not make out a *prima facie* case of unlawful retaliation under the ERA because his refusal to sign Hydro's authorization form did not constitute protected activity under the Act. Pet. App. A15. The court disagreed with the Secretary's conclusion that "by

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[11] Hydro filed two petitions for review before the ARB issued its final decision. The first was remanded at the request of the parties, and the second was dismissed as premature. *See* Pet. App. A8.

12/ The NRC's letter is reproduced as an appendix to the brief of the Philadelphia Area Project on Occupational Safety and Health and others, as *amici curiae* before this Court.

signing the release Doyle 'would have waived his right to file a complaint of illegal blacklisting under the ERA.'" Pet. App. A15. The court explained:

> [T]he release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[] of furnishing or receiving such information pursuant to this authorization."
>
> * * *
>
> The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Pet. App. A15-A16. Unlike the Secretary, the court of appeals declined to construe the release "to apply to situations that by its terms it did not include." Pet. App. A16.

The court of appeals also ruled that, even if the authorization and release form were subject to a possible construction that would have included a waiver of the right to file a complaint for blacklisting, "the Secretary should not have so construed it in light of a well-recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them." Pet. App. A16. Because—as the Secretary recognized—a waiver of ERA rights would be unenforceable, the Secretary should not have construed the authorization to include a release of such rights. *Id.*

The court of appeals also held in the alternative that Mr. Doyle did not meet his burden of proving that Hydro discontinued consideration of his application for impermissible reasons. As a result, even if Mr. Doyle's refusal to sign the authorization and release form were protected under the ERA, the Secretary's decision still could not stand. The court explained that Hydro had proffered "legitimate reasons" for

refusing to hire Mr. Doyle *i.e.*, "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees"—and that Mr. Doyle had not offered "substantial evidence to support a conclusion that [these reasons] . . . were pretextual, as required to impose liability." Pet. App. A17. The court emphasized that the Secretary never addressed "the issue of Hydro's discriminatory intent and instead expressly limited the inquiry simply to a determination of whether [Mr. Doyle's] activities . . . were protected statutorily." Pet. App. A19 n.16. The court explained, however that a finding of discriminatory intent was required for Hydro to be held liable:

> [R]etaliation as a matter of law (and logic) does not occur unwittingly and, therefore, a finding of liability requires "an inquiry into the defendant's state of mind" to prove that "the defendant subjectively intended to discriminate against the plaintiff" on account of his engagement in protected activity.

Pet. App. A19 n.16 (quoting *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir. 1991)).

In this case, however, there was no evidence that Hydro subjectively intended to discriminate against Mr. Doyle for asserting his rights under the ERA. Like the ALJ, the court of appeals noted that Hydro had a legitimate reason to require employees to sign the release, *i.e.*, "to facilitate—without incurring liability—Hydro's assimilation of necessary and highly sensitive employee background information."[13] Pet. App. A20. There was no evidence that Hydro or its employ-

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[13] The court of appeals expressly rejected Mr. Doyle's contention (which he repeats in his petition) that Mr. Doyle already had executed two releases that would have permitted past employers to disclose Mr. Doyle's prior employment history. *See* Pet. 3. The court explained that these other forms were "not comparable to the [challenged] authorization because they concerned only an applicant's possible prior criminal record, not his full employment history." Pet. App. A21 (citing JA 261, 269).

ees read the release as waiving future claims under the ERA. Pet. App. A19 n.18. The court rejected Mr. Doyle's argument that Hydro's discriminatory intent could be inferred from the release itself, observing that "the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually." Pet. App. A20.

Judge Bright, sitting by designation, dissented. Pet. App. A22. In his view, a lay person "likely" would have read the form as waiving the right to bring a retaliation suit against Hydro and past employers. Pet. App. A22. He therefore viewed the release as a violation of Mr. Doyle's ERA rights. *Id.* at A23. Judge Bright did not comment on the Secretary's failure to address the question of Hydro's intent. Although Judge Bright stated that this case "is about statutory interpretation," and not "contract law" (*id.* at A22), he did not point to anything in the ERA that would allow an employer to be held liable in the absence of a finding of discriminatory intent.

ARGUMENT

The court of appeals set aside the Secretary's decision for two reasons. First, the court rejected the Secretary's construction of Hydro's standard authorization form, and—like the ALJ—held that the form did not contain a waiver of Mr. Doyle's ERA rights, but merely released potential claims for privacy infringement. Second, the court ruled that the Secretary should not have held Hydro liable because Mr. Doyle did not prove—and the Secretary did not find—that Hydro intentionally discriminated against him for exercising his rights under the ERA. The petition does not even mention this second holding, and it mischaracterizes the first in an attempt to portray the court of appeals' decision as controversial, and worthy of review by this Court.

Far from announcing some novel rule of law that conflicts with other cases or will have wide-ranging implications, the

court of appeals decided this case on its reading of the specific language contained in Hydro's authorization form. It did not, as the petition claims, "legalize" prospective waivers of ERA rights, but merely held that this particular authorization form did not contain such a waiver.

In addition, Mr. Doyle's failure to prove that Hydro acted with discriminatory intent supplied an independent ground for the court of appeals' decision, and the petition does not challenge that aspect of the court of appeals' ruling. "Discriminatory intent" is an element of any alleged violation of Section 210 of the ERA, and the Secretary never even addressed the issue, much less made any finding that Hydro harbored the requisite wrongful intent. The Secretary's failure to make such a finding alone compelled the court of appeals to set aside his liability decision. More fundamentally, however, the record contains no evidence from which a reasonable fact finder could find discriminatory intent on Hydro's part. Under these circumstances, regardless of petitioner's or the Secretary's construction of the facially neutral authorization and release form, no liability would attach to Hydro.

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEALS

The court of appeals narrowly tailored its decision to the facts of this case, and did not announce any novel legal principle of general application. Notwithstanding the court's limited holding, Mr. Doyle purports to discern a "clear and unequivocal split among the circuits." He reaches this conclusion, however, only by distorting both the decision below and the holdings of the cases with which it allegedly conflicts.

A. The Question Whether a Prospective Employee May Be Required to Waive Substantive Rights as a Condition of Employment Is Not Presented in this Case.

Mr. Doyle asserts that the decision below conflicts with decisions of other circuits, which he claims stand for the general proposition that any prospective waiver of any substantive right, proffered as a condition of employment, is illegal. Pet. 14-16, 20-21. As explained below, however, the court of appeals did not condone such agreements. Nor do the decisions of other courts condemn such agreements in terms as broad as those set forth in the petition.

The principal flaw in the petition is its repeated insistence that the court of appeals somehow condoned, or, as the petition puts it, "legalized," the practice of conditioning employment offers on the prospective employees' agreement to waive important "substantive rights," such as the employee protection provisions of the ERA. *See, e.g.*, Pet. 14, 16, 20-21, 26. This is a complete distortion of the court's decision. The court of appeals—like the ALJ—concluded that the authorization form *did not even purport to waive* an applicant's rights under the ERA. Pet. App. A15-A16; *id.* at A43-A44. Rather, the court properly viewed the form as relating solely to applicants' privacy rights. Moreover, as Mr. Doyle acknowledges elsewhere in the petition, the court of appeals clearly stated that pre-employment waivers of ERA rights are not enforceable. *See* Pet. 16, 18, 19. Indeed, the court referred to such waivers as "illegal release[s]." Pet. App. A16.

Mr. Doyle's claim that the decision below conflicts with *Connecticut Light & Power Company v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) ("*CL&P*"), therefore misses the point. Pet. 14-15, 22-24. According to Mr. Doyle, *CL&P* forbade employers from requesting that an employee "prospectively waive his or her ERA rights." Pet. 24. That case

is readily distinguishable. The employers there proposed to settle a lawsuit by an agreement that prevented the employee from "voluntarily appear[ing] as a witness or a party in any judicial or administrative proceeding" in which either of the defendants or any of their affiliates was a party. 85 F.3d at 91 n.1.[14] The Secretary of Labor found that these "gag" provisions in the proffered settlement agreement were "intended to deprive [the employee] of his participation rights under the ERA." *Id.* at 93. The court of appeals agreed, noting that the settlement agreement had the objective of "keeping [the] employee quiet." *Id.* at 95.

Unlike *CL&P*, this case does not involve an employer's attempt to "restrict an employee's ability to cooperate with administrative and judicial bodies." *See* 85 F.3d at 94. On the contrary, the court of appeals ruled that the Authorization for Release of Information and Records could not reasonably be read to waive Mr. Doyle's ERA rights. Pet. App. A15-A16, A19 n.16. Thus, in the view of the court of appeals, Mr. Doyle was not even *asked* to waive his rights. The court's decision therefore cannot create a division among the circuits regarding the legality of such a request.

Because the court of appeals did not hold that pre-employment waivers of ERA rights are enforceable, or even that it is permissible to request such a waiver, its decision cannot be construed as "legalizing" waivers of ERA rights. Moreover, even if the opinion could be read as implicitly condoning pre-employment waivers of other rights—such as Privacy Act rights where important security considerations require thorough background checks—the decision would not conflict with any of the cases cited in the petition. Although Mr.

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[14] The agreement also provided that the employee would not "do anything to encourage, suggest or otherwise induce any other party, attorney, administrative agency, or administrative or judicial tribunal to contact, involve, or call [the employee] as a witness or to join [him] as a party in such proceeding." *Id.*

Doyle asserts that "[t]his Court has repeatedly held that it is unlawful for an employer to require a prospective employee to prospectively waive statutory rights as a condition of employment," none of the cases that he cites supports such a blanket rule. Pet. 15.

For example, Mr. Doyle cites *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), as prohibiting pre-employment waivers of "substantive rights." Pet. 15. The case involved the enforceability of a release of minimum wage and maximum hour rights under the Fair Labor Standards Act. Far from establishing a broad prohibition against waivers of "substantive rights," the Court explained that whether a particular statutory right may be waived depends on the intention of Congress in passing the statute. *Id.* at 705, 707.[15]

Circuit City and *Gilmer*—both of which enforced pre-employment agreements to arbitrate disputes—are even further afield. In *Circuit City*, the Court merely noted that, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). *Gilmer* made the same statement in the context of discussing the arbitrability of disputes arising under specific statutes. 500 U.S. at 26 (discussing the arbitrability of claims under, *e.g.*, the Sherman Act, the Securities Exchange Act of 1934, and RICO). Neither of these cases held, as Mr. Doyle claims, that "it is unlawful for an employer to require a prospective employee to prospectively waive substantive statutory rights as a condition of employment." Pet. 15.

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[15] Similarly, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), stated that "an employee's rights under Title VII may not be waived prospectively." But it did not purport to assess whether other statutory rights could be waived.

The only case cited in the petition that even arguably involves an attempt by an employer to condition an offer of employment on a waiver of substantive rights is *Secretary of Labor v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989). That case, which arose under the Mine Safety and Health Act, involved an employer that already had fired an electrician in retaliation for his refusal to disconnect equipment safety features. The employer then offered to reinstate the employee, but only if he agreed to work under the same unsafe conditions and to refrain from raising any additional safety concerns. *Id.* at 1450 & n.5. The court characterized the offer of reinstatement as one conditioned on the electrician's "willingness to work under dangerous conditions of which [he] ha[d] previously complained." *Id.* at 1452.

Mr. Doyle's claim that "*Mullins* is very similar to this case" is baffling. Pet. 21. Hydro did not condition its offer of employment on Mr. Doyle's willingness to work in an unsafe environment, and nothing in the court of appeals' decision can be read as condoning such an offer. Moreover, no one at Hydro instructed Mr. Doyle to refrain from reporting any safety concerns that he might encounter at the D. C. Cook plant. Even Mr. Doyle does not suggest that the authorization and release form could be construed to include a waiver of protection for *future* whistleblowing incidents. The court of appeals' decision therefore does not conflict with *Mullins* in the slightest.

In short, Mr. Doyle substantially overstates the governing law when he asserts that pre-employment waivers of "substantive rights" are uniformly unlawful. As *Brooklyn Savings Bank* recognized, the determination whether a particular statutory right may be waived must be made on a case-by-case basis depending on congressional intent. 329 U.S. at 705. The court of appeals construed the Authorization for Release of Information and Records as only releasing claims related to privacy infringement. Pet. App. A15-A16. Mr. Doyle has not argued, and he has cited no case holding, that

statutory or common law privacy rights may not be waived. Indeed, such waivers have been held to be effective affirmative defenses to Privacy Act claims arising from the provision of information to a prospective employer. *See National Treasury Employees Union v. Internal Revenue Service*, 601 F. Supp. 1268, 1273 (D.D.C. 1985) (holding that employee's release of "any . . . Agency from any liability arising from [prospective employer's] investigation and verification" of his record with former employers was affirmative defense sufficient to preclude IRS liability under Privacy Act for disseminating records to prospective employer).

B. The Secretary's Interpretation of the Authorization and Release Form Was Not Based on Any Statutory Construction of the ERA and Was Not Entitled to Deference from the Court of Appeals.

Petitioner contends that the court of appeals improperly failed to defer to the Secretary's determination regarding the "scope of protected activity" under the ERA. Pet. 24-25. Contrary to Mr. Doyle's assertion, however, the court of appeals' ruling was not based on an interpretation of the provisions of the ERA. The court expressly acknowledged that it is appropriate to "pay deference to the Secretary in construing the statutes he is charged with administering." Pet. App. A10 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). At the same time, however, the court correctly recognized that the Secretary overturned the ALJ's liability ruling not because of some difference regarding the proper reading of the ERA but because the Secretary did not share the ALJ's view regarding the meaning of the authorization and release form. As to the latter issue, the Secretary had no special expertise, and his conclusions about the meaning of Hydro's form were not entitled to any more deference than the Secretary himself gave the ALJ.

In an effort to characterize the Secretary's decision as resting on a question of statutory interpretation, the petition contends that "it is clear that the Secretary interpreted the ERA to find that, if an employee reasonably *believes* that he is being asked to prospectively waive his rights and refuses to do so, that *refusal* is protected activity, regardless of whether the proffered agreement is legally enforceable or not."[16] Pet. 25. In fact, the Secretary said nothing of the kind. The Secretary read the authorization form as waiving Mr. Doyle's right to pursue ERA claims. He did not address whether Mr. Doyle's refusal to sign the form would have been protected if Mr. Doyle *erroneously* believed that it extended to ERA claims.

The court of appeals did not decline to defer to the Secretary's interpretation of the "scope of protected activity" under the ERA. The court simply rejected the Secretary's conclusion that Hydro's form waived Mr. Doyle's right to complain about illegal blacklisting. Pet. App. A15-A17 & n.14. Neither the Secretary's Final Decision and Order nor the court of appeals' opinion suggests that the Secretary's construction of the form was based on an interpretation of the ERA itself. Because the Secretary's construction was based on his reading of the language of the release, and not on an interpretation of the statute, the court of appeals owed that

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[16] Here and elsewhere in the petition, Mr. Doyle mischaracterizes the court of appeals' decision by suggesting that the only basis for the court's conclusion that the authorization form did not apply to ERA rights was that it would be unenforceable if it did. *See* Pet. 16, 18, 19, 28. This is not even a plausible reading of the court's opinion, which made it abundantly clear that, by its terms, the authorization form did not relate to ERA rights at all but merely released potential claims for privacy infringement. Pet. App. A15-A16. The court mentioned only in passing that waivers of ERA rights are unenforceable, noting that *even if* the release could be construed to waive ERA rights—which the court concluded it could not—the waiver should not, as a matter of contract construction, be interpreted as doing so. Pet. App. A16.

construction "no more deference than [it] would any lower court's analysis of law." *See, e.g., Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (FERC's conclusion that it had jurisdiction over operation of hydro-electric plant on nonnaviagable river was not entitled to deference because FERC's order was based on its reading of judicial precedent, not the Federal Power Act); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) (Secretary of Labor's ruling that he lacked authority under ERA to award attorneys' fees for proceedings before court of appeals was not entitled to deference because it was based on Secretary's reading of judicial precedent, not his interpretation of the statute).

Relying on *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the petition also claims that the court of appeals was required to follow Mr. Doyle's reading of the release. Pet. 18, *see id.* at 16, 19. Contrary to Mr. Doyle's suggestion, however, the situation in *Maxey's Yamaha* was very different from the one presented here. The case does not stand for the proposition that reviewing courts must apply a "reasonable employee" standard in construing pre-employment contracts such as the release at issue in this case. In fact, *Maxey's Yamaha* did not entail the construction of any contract at all, much less set forth a general principle about how such contracts should be construed. Rather, the case involved an employer that, following a Department of Labor investigation under the Fair Labor Standards Act, was directed by the government to pay back wages to several of its employees. The employer, allegedly short of funds, issued checks to the employees involved but then asked that the employees endorse the checks back to the company, apparently on the understanding that the amounts at issue would be repaid to the employees at a later date. One of the employees balked and asserted her right immediately to receive the back wages owed. The employer then fired this employee. The court of appeals ruled that the discharge was unlawful

because it was motivated at least in part by the employee's assertion of her statutory rights. 513 F.3d at 180-83. The case had nothing to do with any pre-employment screening of potential employees, and no contractual waiver was involved.

The court of appeals' decision in the present case was not based on a disagreement with the Secretary's interpretation of the "scope of protected activity" under the ERA. Rather, the court of appeals rejected the Secretary's erroneous conclusion regarding the meaning of the authorization form that Mr. Doyle was asked to sign. Pet. App. A15, A16-A17. This conclusion was not entitled to deference, *see Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997), particularly where (as in this case) the Secretary rejected the ALJ's contrary interpretation without explanation.[17]

II. THE SECRETARY'S FAILURE TO ADDRESS THE QUESTION OF DISCRIMINATORY INTENT, AND PETITIONER'S FAILURE TO ADDUCE EVIDENCE OF SUCH INTENT, PROVIDE AN INDEPENDENT GROUND FOR THE COURT OF APPEALS' DECISION

Finally, the petition does not even mention, much less challenge, the court of appeals' holding that the Secretary should not have held Hydro liable in the absence of a finding

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[17] *See Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (where Secretary and ALJ disagree, Secretary's decision is reviewed "more critically," to "ensure . . . that the Secretary's conclusion . . . is supported by articulate, cogent, and reliable analysis") (internal citations and quotation marks omitted); *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 894 (3d Cir. 1997) ("[W]here, as here, the Board has reversed a Hearing Officer's findings in its decision, the Board must offer some explanation for the reversal before the court of appeals will defer to its determinations."); *Citizens State Bank of Marshfield v. FDIC*, 718 F.2d 1440, 1444 (8th Cir. 1983) ("The Board's departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision.").

of discriminatory intent. The Secretary's failure to make such a finding, and Mr. Doyle's failure to submit the necessary proof of intent, required that the Secretary's liability ruling be set aside. As the court of appeals explained:

> There is a second, independent reason why we are constrained to grant Hydro's petition and set aside the decision and order of the ARB. Accepting *arguendo* that Doyle established a prima facie case, he has not offered substantial evidence to support a conclusion that Hydro's proffered legitimate reasons for refusing to hire him without his signing the authorization with the release—namely, to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees—were pretextual, as required to impose liability.

Pet. App. A17. As this Court has held, once the employer in a discrimination case provides a legitimate, non-discriminatory reason for the adverse employment action, the burden shifts to the complainant to prove by a preponderance of the evidence that the employer's explanation was merely a pretext for a true motive of discriminating on the basis of a protected trait. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 515-16 (1993). This burden-shifting framework has been applied to ERA cases. *See* Pet. App. A13.

In this case, the court of appeals held that "Doyle simply did not meet that burden." Pet. App. A18. The petition does not mention, much less seek review of, this alternative holding. Any decision that this Court might render on the questions Mr. Doyle claims are presented here thus would not alter the disposition of the case. *See Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (where there is an alternative and independent basis for decision by courts below, any opinion issued by this Court on question presented would be purely advisory); *District of Columbia v. Barry*, 387 F.2d

860, 861-62 (D.C. Cir. 1967) (where review was sought as to only one of several grounds for dismissing indictment, any decision the court might issue could not affect rights of litigants before it and thus would constitute advisory opinion); *see also Glover v. United States*, 531 U.S. 198, 205 (2001) (the Court generally does not decide issues outside the questions presented in the petition); Sup. Ct. R. 14.1(a) (same).

Moreover, even if the Court were to reach out to consider the unchallenged alternative holding, the court of appeals' decision is plainly correct and consistent with prior law. It is well settled that the ERA and similar whistleblower statutes require proof of discriminatory intent by the employer.[18] In this case, the Secretary did not find that Hydro intended to discriminate against Mr. Doyle when it required him to sign its standard authorization form. Indeed, as the court of appeals correctly observed, the Secretary never addressed the issue of Hydro's intent at all.[19] Pet. App. A19 n.16. In

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[18] *See, e.g., Williams v. Lockheed Martin Corp.*, Nos. 98-ERA-40, 98-ERA-42, 2000 DOL Ad. Rev. Bd. LEXIS 103, at *11 (Sept. 29, 2000) (dismissing complaints under ERA and other whistleblower laws where ALJ correctly held that "there [was] no discriminatory intent evidenced by the established facts"); *Scott v. Alyeska Pipeline Service Co.*, No. 92-TSC-2, 1995 DOL Sec. Labor LEXIS 152, at *8 (July 25, 1995) (explaining that four environmental whistleblower laws, like the ERA, "require proof of intent by the employer to discriminate against an employee 'because' or 'by reason of the fact that' the employee engaged in protected activities"); *Dysert v. Westinghouse Elec. Corp.*, No. 86-ERA-39, 1991 DOL Sec. Labor LEXIS 72 at *5 (Oct. 30, 1991) (complainant must prove that retaliation for protected activities was a motivating factor in the decision to take the adverse action); *Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989) (employer's decision must be motivated by "retaliatory animus" to violate the ERA).

[19] The sweeping statements made in the *amicus* briefs regarding what the form was intended or "designed" to do are completely unfounded. *See, e.g.*, Brief of *Amici Curiae* Philadelphia Area Project on Occupational Safety and Health, *et al.* [hereinafter "PHILAPOSH Br."] at 5

addition, the court correctly rejected Mr. Doyle's argument that the necessary discriminatory intent could be inferred from the language of the authorization form, observing that "the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually." Pet. App. A20. As a result, this case is easily distinguishable from other decisions involving employment policies that explicitly discriminate on the basis of some protected trait. Pet. App. A20 & n.19.

In short, there is no evidence that Hydro harbored the necessary discriminatory intent. Like Hydro, the ALJ and the court of appeals interpreted the release as waiving claims related to privacy rights only, not claims for alleged blacklisting under the ERA. Even the Secretary concluded that the language used in the release was at least ambiguous. Any finding of intent that the Secretary might have made, therefore, would have been unsupported by substantial evidence.

Because there was no finding or evidence of the necessary discriminatory intent, this case is quite different from *Maxey's Yamaha*, in which the employee's discharge was based directly on her insistence that she receive immediately the back wages due under the FLSA. Here, as the court of appeals held, Mr. Doyle never proved, and the Secretary never found, that the "immediate cause" or "motivating

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("The HNS release is designed to intimidate HNS workers."); Brief of *Amici Curiae* Northwest Environmental Advocates at 6-7 (suggesting that the release was designed as a "test" to see if prospective employees were willing "to abandon legal claims of retaliation against their past employers"). Similarly, the *amici*'s speculation regarding the potential misuse of similar waivers by employers who might attempt to smoke out whistleblowers in the employment screening process lacks any basis in the record of this case. *See, e.g.*, PHILAPOSH Br. 8, 15. Nothing in the court of appeals' opinion can be construed as sanctioning use of pre-employment waivers *for the purpose of* identifying whistleblowers in order to deny them employment.

factor" behind Hydro's decision not to hire Mr. Doyle was that Mr. Doyle asserted his statutory rights under the ERA. Pet. App. A18. On the contrary, Hydro declined to hire Mr. Doyle because he refused to sign its standard authorization form, which was intended to enable Hydro "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees." Pet. App. A17. The court of appeals correctly ruled that Mr. Doyle did not meet his burden of proving that this legitimate, nondiscriminatory basis for Hydro's employment decision was merely a pretext for unlawful discrimination. Pet. App. A17-A18.

The court of appeals' decision to set aside the Secretary's finding of liability was thus appropriate regardless of the applicable standard of review. There is no room for disagreement that—as both the Secretary and the ARB have held on numerous occasions—intent is a necessary element of a claim under Section 210 that the complainant must prove by a preponderance of the evidence in order to prevail. No amount of deference will permit an agency simply to ignore an essential element of the statute that it is charged with enforcing.[20] The Secretary's failure to make a finding of intent in this case was thus reversible error under any standard.

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[20] *See Garcia v. Sec'y of Labor*, 10 F.3d 276, 279 (5th Cir. 1993) (Secretary's interpretation of Migrant and Seasonal Agricultural Worker Protection Act, which "effectively read[] out the 'with knowledge' requirement" of statute prohibiting employment of illegal aliens, frustrated the clear intent of Congress, and was not entitled to deference).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 02-297

IN THE
Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,
v.
HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF LINDA TRIPP, *et al.* IN SUPPORT OF PETITIONER SHANNON DOYLE

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14 pp

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR GRANT OF A WRIT OF CERTIORARI

Counsel comes before this Honorable Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States of America.

Counsel for Amici respectfully requests this Honorable Court to grant Amici consent to file an Amicus Curiae brief in support of petition for grant of certiorari in the case of *Shannon T. Doyle v. Hydro Nuclear Services*, No. 02-297.

Counsel has sought consent from each of the parties to the case. Counsel has obtained consent to file an Amicus Curiae brief from two of the parties, viz. Shannon T. Doyle and the Solicitor-General of the United States. Letters of Consent from these two parties have been lodged with the Clerk of the Court.

Counsel has been refused consent by Hydro Nuclear Services, Respondent in *Shannon T. Doyle v. Hydro Nuclear Services*. Respondent gave no reason for its decision.

The amici in this case, Ms. Tripp, Dr. Frederic Whitehurst and Ms. Adrienne Anderson have all experienced adverse actions as the result of their whistleblowing activity. These individuals are very concerned that the *Doyle* decision will, if allowed to stand, will add to the immense discouragement that whistleblowers already suffer. Having braved an arsenal of employer retaliation, Ms. Tripp, Dr. Whitehurst and Ms. Anderson are all too aware of the threat to the public interest posed by the Third Circuit's decision in *Doyle v. Hydro Nuclear Services*.

For these reasons, counsel respectfully requests that he be permitted to file the attached Amicus Curiae brief on behalf of Ms. Linda Tripp, Dr. Frederic Whitehurst and Ms. Adrienne Anderson.

Respectfully submitted

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

As whistleblowers of some public standing, amici, Ms. Linda Tripp and Dr. Frederic Whitehurst are well positioned to speak from experience concerning the intimidating nature on whistleblowers that the Third Circuit's decision in *Doyle v. Hydro Nuclear Services* will have if allowed to stand. Ms. Adrienne Anderson undertook activities protected by the ERA and suffered the full force and fury of adverse actions by her employer, including a campaign of vituperative personal criticism. If she had signed the type of waiver required of Mr. Doyle by Hydro Nuclear Services, her willingness to expose the injurious conduct of her employer would have been greatly weakened.

In each case, these individuals have experienced harassment, retaliation and employment discrimination as a result of exposing instances of employer misconduct harmful to the public good.

It is difficult to exaggerate how vital avenues of legal redress are to those courageous employee-whistleblowers, both actual and potential, who put the safety, integrity and health of the commonweal before their own careers. Protecting the future employment and careers of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous institutional practices gravely prejudicial to the public good.

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[1] Pursuant to S.Ct. Rule 37.6, Amici state that counsel for a party did not author the brief in whole or in part and that no one other than Amici, their members or their counsel have made any monetary contribution to the preparation or submission of this Brief.

Had the *Doyle* decision had been the law of the land at the time and the waiver requirement part of their respective employment contracts, it is doubtful whether the nefarious activities revealed by Ms. Tripp, Dr. Whitehurst and Ms. Anderson would have come to light. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous career risks.

If employers are able, as the *Doyle* decision now teaches, to require prospective employees to waive an employer's liability for adverse action taken on the basis of an applicant's previous whistleblowing activity, then whistleblowers face even greater disincentives to expose employer misconduct.

ARGUMENT

The very reason for the creation of whistleblower protection provisions both at the state and federal level, is that conscientious employees should not have to choose between keeping their jobs and their moral and legal obligation to report actual or probable violations of law by their employers. This is, however, the choice that will effectively be thrust upon many such employees if employers are allowed to insist on their employees signing waivers such as the one at issue in Mr. Doyle's suit. The waiver in Mr. Doyle's case releases his employer and any other employer from whom his employer obtained information about him from any claim that this information had been provided or used to deny Mr. Doyle employment because of his whistleblower activities. Should employers be allowed to require their employees to sign such waivers, the right of employees to file a complaint of illegal blacklisting could be eliminated. This would completely discourage employee-whistleblowers from even seeking a position with employers who used waivers like the one at issue in Mr. Doyle's case. Furthermore, the use of such waivers in employment contracts would undoubtedly have a chilling effect on any would be whistleblowers. This runs counter to the policies underlying all whistleblower protections, not just those provided by Section 210 of the Energy Reorganization Act. Therefore, the Court should grant Shannon Doyle's Petition for a Writ of Certiorari and review the decision of the Unites States Court of Appeals for the Third Circuit.

Frequently the efforts of employee-whistleblowers to expose an employers wrong doing are rewarded by vicious and discriminatory responses by the employer. Congress recognized the need to protect employee-whistleblowers from this sort of discrimination when it amended the Safe

Drinking Water Act (SDWA), the Clean Air Act (CAA), the Energy Reorganization Act (ERA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substance Control Act (TSCA), the Solid Waste Disposal Act ((SWDA), also known as the Resource Conservation and Recovery Act, (RCRA)), and the Water Pollution Control Act (WPCA). *See* Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(I) (1994); Clean Air Act (CAA), 42 U.S.C. §7622 (1994); Energy Reorganization Act (ERA), 42 U.S.C.§ 5851 (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1994); Solid Waste Disposal Act (SWDA), 42 U.S.C .§ 6971 (1994); Water Pollution Control Act (WPCA), 33 U.S.C.§1367 (1994). Many states have also recognized the need to protect public and private whistleblowers from such discrimination. *See generally* Robert Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 *Admin L. Rev.* 581 (1999).

A glance at the disgraceful treatment of the Amici, in response to their protected activities, reveals the harsh nature of the discrimination faced by many employee-whistleblowers. Frederic Whitehurst, whose story was told in *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* (New York: The Free Press, 1998), was subjected to a campaign of harassment and degradation in response to his attempts to report a pattern of wrongdoing in the FBI crime lab. Dr. Whitehurst pursued his complaints internally for more than three years, and, only after seeing no result, did Dr. Whitehurst turn to the outside. In response, the FBI and the Office of Investigator General claimed that Dr. Whitehurst was unfit for FBI work, because he recklessly reported wrongdoing. In reality, Dr. Whitehurst was merely acting in accordance with his duty to follow FBI regulations,

which demand that each FBI employee report *any* possibility of any wrongdoing.

Similarly, Ms. Linda Tripp has also been subjected to a campaign of discrimination and harassment in response to her efforts to report wrongdoing in the Whitehouse. In retaliation for Ms. Tripp's having provided evidence to the Office of Independent Counsel, which eventually resulted in the impeachment of President Clinton, the Defense Department leaked information from government files to discredit and malign her. As a result of this, Ms. Tripp, whose work performance was consistently rated as outstanding, has faced severe difficulties in obtaining employment, even at a lower grade and salary.

Ms. Anderson faced severe harassment and discrimination from her employer, the Metro Wastewater Reclamation District (A Metro) in Colorado, for expressing serious concerns of Metro workers to other members of the Board of Directors for Metro. Metro repeatedly attacked Ms. Anderson's credibility through the media, damaging her professional reputation, and her ability to obtain future employment. In finding for Ms. Anderson in her whistleblower claim against Metro, the Administrative Law Judge noted that the hardship imposed on Ms. Anderson by Metros attacks was evidenced not only by the fact that she was not reappointed to the Board of Directors for Metro, but also by the fact that she had since been unable to obtain a full time position at the University of Colorado, where she had been teaching part time. *See Anderson v. Metro Wastewater Reclamation District*, 1997-SDW-7, at 32-33 (Dept of Labor Sept., 1997).

Regrettably, far too many whistleblowers and would be-whistleblowers are subjected to similar treatment by their

employers. If employers are permitted to make waivers like the one at issue in Mr. Doyle's case a precondition of employment, then many of these whistleblowers could be forced to forfeit their rights to be free from illegal blacklisting in order to obtain employment. This would have a substantial chilling effect on the protected activity of whistleblowers. An employee whose conscience demands that he or she report an employers wrong doing, might be sorely tempted not to come forward with information because of fears that he or she might be blacklisted and have no available remedy.

Whistleblowers seeking jobs would almost assuredly be discouraged from seeking employment with any company or agency that required them to sign a release that might prevent them from pursuing a valid claim for illegal blacklisting. Judge Bright, in his dissenting opinion in *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243, 255 (3d Cir. 2002) (Bright *dissenting*), noted that it was quite probable that any layperson would have understood the release that Mr. Doyle was asked to sign to mean that he or she would release former employers as well as putative employers from liability for any harm caused by releasing information about the employee. Although the Third Circuit noted, in its analysis, that as interpreted by Mr. Doyle, the release would have been unenforceable (*Doyle*, 285 F.3d at 252); this is small comfort to whistleblowers like Mr. Doyle, who lack the legal training to know that the waiver could not be used by the employer as a defense to a retaliation claim. Furthermore, it would be absolutely repugnant to many whistleblowers, who above all else prize the integrity of their word, to use a technicality in the language of the waiver to attempt to get around a promise they believed they were making to release former as well as putative employers from any liability for any harm caused by releasing information about the employee. These reasons

support the views adopted by both the Secretary of Labor and Judge Bright: that employees must not be compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment. *Doyle*, 285 F.3d at 254-55 (Bright *dissenting*).

Waivers such as the one at issue in Mr. Doyle's case, in so far as they discourage employee-whistleblowers from ever applying for jobs with the companies or agencies that use them, could further chill any disclosures of employer wrongdoing by would be whistleblowers. The Administrative Law Judge in *Hobby v. Georgia Power Company*, 1990-ERA-30, at 7 (Dept of Labor Feb., 2001) noted that one reason why reinstatement is an important remedy in many whistleblower actions is that, a return of a discharged employee to the job site provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective. Similarly, if employee-whistleblowers are discouraged from even applying for positions where they might be required to sign waivers such as the one at issue in Mr. Doyle's case, then other employees might well begin to doubt whether the legal protections of the whistleblower statutes are Areal and effective. This could lead to a significant chilling effect on ay potential disclosure of employer wrongdoing by whistleblowers.

CONCLUSION

For the reasons set forth above, the Court should grant Shannon Doyle's Petition for a Writ of Certiorari and review the decision of the Unites States Court of Appeals for the Third Circuit.

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No. 02-297

IN THE
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SHANNON T. DOYLE,
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v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER FOR A WRIT OF *CERTIORARI*

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ARGUMENT

Petitioner Shannon Doyle hereby replies to the opposition to his petition for *certiorari* filed by the Solicitor General ("Solicitor") and Hydro Nuclear Services ("Hydro").

Neither the Solicitor nor Hydro seriously contested Mr. Doyle's argument that this case presents an exceedingly important question of federal law. Significantly, the Solicitor did not argue in support of the merits of the Third Circuit's ruling and did not contest the finding of the dissenting judge that the pre-employment waiver at issue in the case could "chill" the willingness of "all employees" to "report safety issues to the proper regulatory authorities." A23. The Solicitor also did not dispute the dissenting judge's conclusion that the waiver at issue in this case "fundamentally undermined" Congress' goal of "protecting potential whistleblowers." The Solicitor also did not dispute the opinion that Mr. Doyle suffered a "grave injustice" and upholding the Hydro waiver "dealt a blow to the safety of the nuclear industry."A23-24

In regard to the second ground for granting *certiorari*, both the Solicitor and Hydro engage in circular reasoning to mask a clear split between the Third Circuit's holding and other courts of appeal. The Solicitor's argument can be summarized as follows: Because the Third Circuit did not find the Hydro-waiver an improper release of substantive employment claims, the legality of the release does not merit this Court's review. Solicitor, p. 9. This argument is without any merit.

The fact that the Third Circuit attempted to mask the illegal nature of the Hydro release does not cure the defects in the lower court's decision. The lower court completely rejected the ruling of the Secretary of Labor which found the waiver to be improper. The panel also improperly attempted to explain-away uncontested facts in the record and legal concerns raised by the dissenting judge and the Secretary of Labor. The reasoning of the lower court conflicted with the strong line of cases prohibiting restrictions on employee protected activity as a condition of employment. These cases all barred such employer conduct, regardless of whether the employer had specific intent to ever enforce the pre-employment restrictions. *See, Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

Significantly, the Solicitor also ignored the conflict between prior decisions of this Court and the Third Circuit's holding. The Solicitor did not even attempt to explain how the Third Circuit's holding could be reconciled with the language in cases such as *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) and *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728 (1981), each of which strongly held that pre-employment waivers of substantive rights, such as those waived in the Hydro release, violated federal law.

When the Third Circuit upheld the Hydro waiver and overturned the careful ruling of the Secretary of Labor, they created a split with other courts and administrative agencies. Prior to the Third Circuit's ruling, the Nuclear Regulatory Commission ("NRC") and the U.S. Department of Labor ("DOL") had both found the Hydro waiver to be illegal.

Other courts of appeal and this Court had rejected similar employer-efforts to force prospective employees to waive substantive rights as a condition of employment.

Certiorari is fully justified in this case. The lower court's ruling ignored (and give no deference to) the administrative determinations of the DOL (A29) and the NRC (A57) and it set a precedent which undermined "all employee's rights." A23.

I. THE PROSPECTIVE WAIVER LEGALIZED BELOW CREATES A DIVISION AMONG THE CIRCUITS.

The main argument against *certiorari* provided by both the Solicitor General and Hydro is premised on the purported "fact-bound" nature of the Third Circuit decision. According to the respondents, simply because the Third Circuit held that the waiver in question was "unambiguous" and did not interfere with employee protected activity, the analysis of the waiver should end there, and the legality of the Third Circuit's ruling should not be further reviewed.

This circular argument misses the entire issue. If the release unambiguously did not waive prospective rights, then respondents would be correct. But the issue here is how the Third Circuit erroneously ignored the factual findings and legal conclusions of the Secretary of Labor, and how these erroneous determinations created a conflict with prior authority.

The appropriate starting point to evaluate the *cert.* worthiness of this case is a careful review of the waiver Mr.

Doyle was required to sign. In relevant part, the waiver stated:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above [which included any former employer of the employee] furnishing or receiving any information pertaining to me from any and all liability or claim as results (*sic*) of furnishing or receiving such information pursuant to this authorization.

A45.

If, upon reading that waiver, this Court were to agree that the release in question was "unambiguous" and could not be reasonably interpreted as "purporting to waive substantive employment claims, including blacklisting," than *certiorari* should be denied.

However, if this Court were to agree with the conclusion of the Secretary of Labor, the determination of the Nuclear Regulatory Commission (A57) or the "on its face" interpretation of the waiver provided by Judge Bright,[1/]

[1/] "On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same

(continued...)

it is absolutely clear that the waiver at issue in this petition did in fact purport to release substantive employment claims. Furthermore, as set forth in these various opinions, upholding Hydro-style waivers would cause a reasonable employee to be chilled in the exercise of Congressionally protected rights.

"On its face," the Hydro waiver "release(d) former employers as well as putative employers from liability" against claims filed by employees who had engaged in protected activity. A22. As such, the Third Circuit's decision also directly conflicts with prior decisions of this Court, which consistently found such pre-employment waivers to be improper. *See, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981) (Burger, C.J., dissenting) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974).

The Third Circuit's ruling also conflicts with the decisions of other circuit courts which have uniformly found waivers, which force employees to choose between a job and giving up an important substantive federal rights, to be illegal. For example, in *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the Eighth Circuit held that where the "immediate cause" or of an employee's discharge is the fact that the employee asserted his or her statutory rights, and refused to execute an improper waiver, the discharge was *per se* discriminatory. *Accord., Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir.

1/(...continued)
situation would understand the release language." A23 (Bright dissenting).

1989) (an employment offer which required the employee to prospectively waive the substantive statutory protections was unlawful).

II. THE PROSPECTIVE WAIVER LEGALIZED BELOW PRESENTS EXCEEDINGLY IMPORTANT QUESTIONS.

The Solicitor and Hydro gave short-shrift to the alternative reason for granting *certiorari*: The decision of the Third Circuit raises extremely important questions of federal law which have far-reaching implications.

The critical impact of Hydro-style waivers will have on "all employees' rights" is well established in this case. A23. Initially, the waiver acted to undermine Mr. Doyle's ability to obtain employment with Hydro. It forced Mr. Doyle to inform Hydro of his prior whistleblowing activities and his concerns about executing the release. It also directly resulted in Hydro's refusal to hire Mr. Doyle and Hydro's report to other potential employers that Mr. Doyle had been "denied access" at a nuclear plant. Doyle's career in the nuclear industry was ruined and he suffered "devastating psychological, emotional and financial" damages. A25.

The Secretary of Labor recognized that Hydro-style waivers were generally "destructive"of employee rights. Such waivers undermined "Congressional intent" by making employees "afraid to speak out about safety problems." A34. The concerns of the labor department were also echoed by the Nuclear Regulatory Commission, which issued a Notice of Violation against Hydro on the sole basis of its waiver. A57.

Moreover, numerous *amici curie* have filed briefs or have requested leave to file briefs in support of Mr. Doyle's petition. These *amici* range from public interest organizations with years of experience representing whistleblowers, to organizations which represent tens of thousands of employees on health and safety issues, to leading nationally recognized whistleblowers. All of the *amici* recognize the practical impact Hydro-style waivers will have on employee rights and on Congress' goal of protecting public safety. They recognize that Hydro-style waivers will cause numerous other employees to suffer "grave injustices" similar to those suffered by Mr. Doyle.

Finally, Judge Bright, the dissenting judge on the Third Circuit panel, reviewed the record and recognized how Hydro-style waivers "fundamentally undermine(d)" "Congress' goal" of protecting whistleblowers. A23. Judge Bright readily understood how Hydro-style waivers not only "dealt a blow to the safety of the nuclear industry," but would also have a wide impact far beyond the nuclear industry. A24. Hydro-style waivers would violate "all employees' rights." "Anyone" signing such a release would be "left with the impression" that they waived their rights under all federal anti-retaliation laws, not just the Energy Reorganization Act.

Any whistleblower looking for a new job, who is confronted with a Hydro-style waiver, will be intimidated. Some, like Mr. Doyle, will object to the waiver and be fired. They will have no legal recourse. Others simply will be "chilled" and will decline to further seek employment with a corporation utilizing the Hydro-waiver. The willingness of most employees to engage in Congressionally encouraged

protected activity will be undermined. Who would engage in such activity if they understood that their employer could legally bad mouth them every time they attempted to find a new job?

Given the rise in employer utilization of pre-employment contracts, and the unquestionably destructive impact of Hydo-styled waivers, it is exceedingly important for this Court to grant *certiorari*.

III. AN "INDEPENDENT BASIS" DOES NOT EXIST FOR DENYING *CERTIORARI*.

Hydro and the Solicitor both assert that Mr. Doyle did not seek *certiorari* to challenge the alleged "legitimate non-discriminatory reason" given by Hydro "for refusing to hire" Mr. Doyle. Solicitor's Brief, p. 10. This argument is without merit. Moreover, an analysis of the reasoning behind the argument further explains how the Third Circuit's opinion caused a split within the lower courts.

Respondents' argument is predicated on the assumption that the Hydro waiver was proper. If the waiver was proper, Mr. Doyle's refusal to execute the waiver could constitute a legitimate non-discriminatory reason for Hydro's action. But it is the legality of the wavier which is at issue in this petition. If the waiver was not proper, then the so-called legitimate reason for the action would be called into question. Thus, the issue which merits *certiorari* is the legality of Hydro-style waivers.

As was explained in Mr. Doyle's petition, at page 19, other circuit courts which have evaluated improper waivers

similar to the Hydro wavier issued rulings identical to the Secretary of Labor's ruling in this case. Once the waiver was found to be illegal, the employee was protected in refusing to waive rights, regardless of the employer's subjective intent. *See*, *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975).

In this case, it is uncontested that Hydro "refused to hire" Mr. Doyle merely "because he refused to sign" the Hydro waiver. A35. The Secretary of Labor did not have to engage in a *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), analysis in order to determine the employer's motive. The reason for the adverse action was not disputed. It would have been a waste of resources for the Secretary to mechanistically apply the *McDonnell Douglas* factors when the reason for discharge was not at issue.

Other courts of appeal which have evaluated improper waivers have performed an analysis identical to the Secretary's analysis. In *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the court held that when the reason given for an adverse action was an employee's exercise of a protected right, further inquiry into employer motivation was not necessary . *Accord., E.E.O.C. v. Bd. of Governors*, 957 F.2d 424, 427-28 (7th Cir. 1992) (rejecting the application of *McDonnell Douglas* in a waiver case). Thus, every case in which a Court has found that a waiver and/or a condition of employment was illegal on its face - and an employee's reasonable objection to that wavier and/or condition of employment was the reason for the adverse action, there was simply no need to engage in a *McDonnell Douglas* type analysis.

Obviously, if the Hydro waiver were proper, and Mr. Doyle still refused to execute the waiver, Mr. Doyle could have alleged that Hydro used the failure to execute the waiver as a pretext for firing him. At that point a court would need to employ the *McDonnell Douglas* analysis in order to determine the actual motive of an employer. But that is not what occurred in this case. Hydro insisted upon Mr. Doyle executing a waiver at odds with this Court's prior holdings and refused to hire Mr. Doyle in violation the rule set forth in *Alexander*, *Barrentine*, *Brennan* and *Mullins*.

The issue presented in this petition is not whether an employee may be terminated for refusing to execute a proper waiver. As identified by Judge Bright, the issue presented here is whether employers can utilize Hydro-style waivers to "fundamentally undermine" Congress' intent to protect employees who "report safety issues to the proper regulatory authorities." A23.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Doyle's Petition for Writ of *Certiorari*.

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